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No. 89-7691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DALE ROBERT YATES,
Petitioner,

v.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections,
and the ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 29, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

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CHRONOLOGY OF RELEVANT EVENTS

DATE	PROCEEDINGS
February 13, 1981	Petitioner arrested and charged with the murder of Helen Wood
April 9, 1981	Petitioner indicted for murder, armed robbery, assault and battery with intent to kill, and conspiracy
April 27, 1981	Commencement of petitioner's trial in Greenville County Court of General Sessions.
April 30, 1981	Petitioner convicted as charged.
May 2, 1981	Petitioner sentenced to death.
December 22, 1982	Conviction and sentence of death affirmed by South Carolina Supreme Court, *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982).
July 6, 1983	Certiorari denied, *Yates v. South Carolina*, 462 U.S. 1124 (1983).
October 6, 1983	Application for post-conviction relief in the Greenville County Court of Common Pleas filed.
November 1, 1983	South Carolina Supreme Court decides *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), disapproving jury instructions which create mandatory rebuttable presumptions of malice.
August 14, 1984	Post-conviction relief denied by order of Hon. C. Victor Pyle, Resident Judge, Thirteenth Judicial Circuit.
January 14, 1985	Petition for writ of habeas corpus in the South Carolina Supreme Court challenging the constitutionality of the malice instructions given at his trial filed.

DATE	PROCEEDINGS
January 14, 1985	Petition for writ of certiorari in the South Carolina Supreme Court seeking review of the denial of post-conviction relief, and moves to consolidate petition for writ of certiorari with petition for writ of habeas corpus filed.
February 14, 1984	Respondents file return in South Carolina Supreme Court stating that they do not oppose consolidation of petitions "to resolve the apparent issues," but opposing relief.
May 1, 1985	Petitioner files supplemental memorandum of law in South Carolina Supreme Court calling court's attention to *Francis v. Franklin.*
May 23, 1985	Petitions for writ of certiorari and for habeas corpus summarily denied by South Carolina Supreme Court in unpublished order.
June 7, 1985	South Carolina Supreme Court grants 60-day stay of execution to permit filing of petition for writ of certiorari in United States Supreme Court.
August 9, 1985	Petition for certiorari filed in United States Supreme Court seeking review of South Carolina Supreme Court's denial of habeas corpus relief.
October 15, 1985	United States Supreme Court grants petition for writ of certiorari, vacates judgment, and remands case to the South Carolina Supreme Court for further consideration in light of *Francis v. Franklin,* 471 U.S. 307 (1985); *Yates v. Aiken,* 474 U.S. 896 (1985).

DATE	PROCEEDINGS
March 26, 1986	Oral argument before South Carolina Supreme Court on remand.
September 29, 1986	Opinion of South Carolina Supreme Court denying habeas corpus petition, *Yates v. Aiken,* 290 S.C. 232, 349 S.E.2d 84 (1986).
December 19, 1986	Petition for writ of certiorari filed in United States Supreme Court.
March 30, 1987	Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted.
January 12, 1988	United States Supreme Court reverses judgment of South Carolina Supreme Court and remands with instructions "to grant the relief that federal law requires." *Yates v. Aiken,* 484 U.S. 211 (1988).
February 6, 1989	South Carolina Supreme Court denies relief on remand, with two justices dissenting. *Yates v. Aiken,* —— S.C. ——, 391 S.E.2d 530 (1989).
January 29, 1990	South Carolina Supreme Court denies rehearing, issues amended majority opinion in *Yates v. Aiken,* —— S.C. ——, 391 S.E.2d 530 (1989).

GREENVILLE COUNTY COURT
OF GENERAL SESSIONS

No. _____

STATE OF SOUTH CAROLINA

v.

DALE ROBERT YATES

EXCERPT FROM PROSECUTOR'S OPENING STATEMENT TO THE JURY

• • • •

[771] Under our system of justice, and I certainly support that, everybody is presumed to be innocent until proven guilty beyond a reasonable doubt. That is the phrase I want to mention to you now and it is something that you will take back with you as a legal yardstick, if you will, to assist you in evaluating the facts of this case in arriving at a verdict: guilty or not guilty. Reasonable doubt. What is reasonable doubt? I say, at the beginning, if you have a reasonable doubt, Madam Foreman and ladies and gentlemen, at the conclusion of this first part of this trial, as to the guilt of this Defendant, then you should find him not guilty. If you have a reasonable doubt as to his guilt, you should find him not guilty, for that would be justice and that is what we are seeking. If you do not have a [772] reasonable doubt as to his guilt, then you should find him guilty, for that would be justice and that is what we are seeking.

Now, what is this term "reasonable doubt"? Let me tell you first of all what it is not. It is not just a doubt; it is a reasonable doubt. The law recognizes that about

every proposition in life, unless you are an eyewitness to it, you are going to have some doubt, in the back recesses of your mind, about everything, unless you were personally involved in it. Of course, if you are personally involved in it, you couldn't be a juror. So, if you have just a doubt about his guilt, then you must find him guilty. If you have just a doubt. But what you must have in your mind, as a collective body, is a reasonable doubt, known to the law and defined by our supreme court, as I best understand it, a substantial doubt. Reasonable doubt means substantial doubt.

Sometimes you hear jurors say, "Well, I believe you've —the law says you must find people guilty beyond every shadow of a doubt," or words like that; well, that is not the law, and Judge Harris will tell you. Of course, you must follow the law, and I know you will.

Bear in mind, that is the burden of proof that I carry. I must convince you, through the evidence and testimony, beyond a substantial doubt. That is, you must go [773] back and say, "I have no substantial doubt about his guilt. I don't have a substantial doubt about it." If you do that, then the State would have met the burden of proof. If you say I've got a substantial doubt, then you must find him not guilty.

• • • •

EXCERPT FROM DEFENSE COUNSEL'S OPENING STATEMENT TO THE JURY

• • • •

When I say "beyond a reasonable doubt" I mean exactly the same thing in the law as you would in the everyday English language and that is a doubt for which you have a real reason, not a fanciful doubt, not a whimsical doubt, because you could doubt any proposition if you wanted to.

• • • •

So, that is the standard of proof which the State must meet. I tell you to be aware that it is the State's burden and that is the degree of proof by which the State must convince you of the existence of the elements of this charge.

• • • •

EXCERPT FROM TESTIMONY OF DAVID EUGENE LOFTIS

• • • •

[816] Q. On February 12th, there at the Mauldin Gardens Apartments, when you and Davis and Yates were together, is that when you had the conversation?

A. Yes, sir.

Q. What time of day or night was it, do you remember?

A. I am not sure of the time.

Q. Were y'all doing anything in particular, other than sitting around talking?

A. Just drinking a little bit and smoking a little reef.

Q. Now, tell us about the conversation that you three had.

A. Henry had mentioned something about robbing a place—

Q. The three of your there?

A. Right, and he said that he had a knife and I told him that, you know, a knife wouldn't do it. You know, that nine times out of ten, the places you go in have a gun, and you'd get your ass shot as soon as you start to leave. So, Dale had mentioned that his brother had a gun and that he would give it to me faster than he would give it to himself.

[817] Q. Who mentioned that his brother had a gun?

A. Dale Yates.

Q. The Defendant?

A. Yes, sir.

Q. Did you know his brother?

A. Yes, sir.

Q. What is his brother's name?

A. Alan Yates.

Q. Dale mentioned to you that his brother had a gun?

A. Yes, sir.

Q. What role were you suppose to play in getting the gun?

A. I told Alan Yates that I was getting—that we were going on the other side of Greenville to buy some dope, and I wanted the gun for protection. So, he gave me the gun.

Q. Now, where did Alan Yates live?

A. He lives right in front of his mother. I believe that is off of Prescott Avenue in Mauldin.

Q. You know how to get to it?

A. Yes, sir.

Q. Did you go over there that night on February 12th, to Alan Yates' place?

A. Yes, sir.

Q. How did you get over there?

A. I rode with Henry and Dale.

[818] Q. What type of car did you ride in?

A. In Henry's buick.

Q. The blue buick that is shown there in the photographs that you identified?

A. Yes, sir.

Q. Did the Defendant, Yates, ride with you?

A. Yes, sir.

Q. Tell us what happened when you got over there to the Defendant's brother's place.

A. When we drove up, Alan Yates was either coming out of his mother's house or was outside, I am not sure which one it was; but he walked up to the car and I explained to him I needed to borrow the gun because I had to go cop some dope.

Q. When you say "cop some dope" that means go buy some dope?

A. Yes, sir, and I needed it for my own protection, because I didn't like where I was going to buy the dope. So, we went inside the house—me and Dale went inside the house—Alan went back and got the gun and brought

it to me. And I believe we smoked a couple of joints with Alan and we left and went back to the apartment.

Q. Does this look like the pistol that Alan Yates gave you in the presence of his brother, Dale Yates?

A. Yes, sir.

[819] Q. Was it enclosed in anything like a holster or a package or anything else when you received it?

A. Yes, sir, a black holster.

Q. Does this look like the holster?

A. Yes, sir.

Q. Now, Mr. Loftis, after you got this pistol from the Defendant's brother there at his house—By the way, was Mr. Yates, the Defendant, was he with you there in the house when you received this pistol?

A. Yes, sir.

SOLICITOR WILKINS: I would like to mark this for identification, at this time, Your Honor.

(State's Exhibit No. 10 marked for identification.)

Q. How about bullets? Did the pistol have any bullets in it?

A. Alan told me that it was loaded and I didn't check. I just assumed that it was and left it in the holster.

Q. Did you take it back to the car?

THE COURT: Speak up, Mr. Loftis, nobody can hear you?

A. I was told that the gun was loaded, and that I assumed it was and I didn't check and I left it in the holster, and I put it in my belt and went back to the car and, then, we left.

Q. Did the Defendant, Yates, go back to the car with you?

[820] A. Yes, sir.

Q. Was Henry Davis still waiting in the car for you?

A. Yes, sir.

Q. Where did you three, then, go when you left?

A. We went to Henry Davis' apartment.

Q. Back over there to the Mauldin Gardens?

A. Yes, sir.

Q. Did you have the pistol with you at that time?

A. Yes, sir.

Q. Did you see any other weapons?

A. No, sir, not at that time.

Q. Did you leave the Mauldin Gardens or Henry Davis' apartment that night?

A. I believe we went to pick up his wife from work. I believe she worked that night. I am not quite sure.

Q. Other than, perhaps, that, did you go out anywhere in the community in the county that night?

A. No, sir, not nowhere except ride around to get the gun and in that area [sic].

Q. Where did Henry Davis spend the night that night, the night of February 12th, going into the 13th of February?

A. In his own bedroom at his apartment with his wife.

Q. Where did you stay?

A. I slept on the floor, in front of the T.V., in the living room.

[821] Q. At Henry Davis' apartment?

A. Yes, sir.

Q. How about Dale Yates, where did he stay?

A. He slept on the couch in the living room.

Q. All three of you slept in the same apartment that night?

A. Yes, sir.

Q. What happened the next morning?

A. The next morning, we got up and eat breakfast and, then, we left and just went riding around. I can't remember what Henry told his wife we were going to do, but we left and we rode around just looking at places to rob.

Q. Who was driving the car?

A. Henry Davis.

Q. Were you riding in the front seat or the back seat?

A. Right front seat.

Q. How about the Defendant Yates, where was he?

A. Back seat.

Q. As you rode around looking for places to rob, where did you ride to?

A. Down Log Shoals Road, over—I don't know the name of the roads, they are over toward Donaldson Center and over in that area. I don't know the name of those roads back over in there—just, you know, little stores that Henry knew and Dale knew and we just, you know, casing them [822] out.

Q. How would you case them out?

A. Ride by and look and see if they was [sic] many people there or if it looked like there wasn't anybody there at all or whatever.

• • • •

Q. Mr. Loftis, as you rode around casing out some stores down around Donaldson Center and Log Shoals Road, did you ever point out any stores? Did you know of any stores or identify any stores, yourself?

A. No, sir.

Q. Who identified the stores or decided which stores y'all would go ride and case out?

[823] A. Mr. Yates and Mr. Davis.

Q. Did you have any conversation about who was suppose to do what, whenever you found the right store?

A. It was talked about and, I think, it was, more or less, I decided that I'd go into the store and do the armed robbery.

Q. What was Mr. Davis going to do?

A. He was going to drive the car.

Q. What was Mr. Yates going to do?

A. He was going to stay in the car and just watch, you know, my backup or whatever.

Q. Yates was going to be the backup?

A. Yes, sir.

Q. As you pulled up to any of the particular stores, did you have any conversation about this particular store or that particular store?

A. They would say, "what about this one?" or something like that, and I would say "no" or "I don't like the way it looks." I'd make up an excuse.

Q. Made up an excuse about—What kind of an excuse are you talking about?

A. I didn't really want to do it. I don't know, but I'd just make up an excuse not to do—to rob the place, and just to keep going on and, hopefully, just kept riding on from place to place.

[824] Q. This was all during the morning hours?

A. Yes, sir.

Q. At any time during that morning, did you tell Mr. Davis and Mr. Yates that you weren't going to do it?

A. I don't know if it was so much in that words or whatever. We had talked about if, you know, if you rob a place, the time you could get out of it; and if somebody had got killed in the process. I was worried about that.

Q. What are you talking about?

A. You know, talking about you can get the death sentence for killing somebody while in the process of a armed robbery.

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[825] Q. Did Yates or Davis ever get out of the car and go in any store?

A. No, sir, not that I remember.

Q. Did you talk about it or did they talk about it, about the time you could get for armed robbery?

A. I did most of the talking about it, yes, sir.

Q. And you told them "you can get a lot of time for armed robbery"?

A. Yes, sir.

Q. Who made the statement that if somebody gets killed, you can get the electric chair?

A. I did.

Q. Did you tell Yates and Davis that?

A. Yes, sir.

Q. Any time, during that morning, did you finally just quit riding around and go anywhere?

A. Yes, sir, somehow we ended up on 291. So, we went on up to a place called "Why Nots" and—

Q. What is "Why Nots"?

A. It's a little pool room and arcade deal. It is up on Wade Hampton Boulevard.

Q. Had you ever been there before?

A. Yes, sir.

Q. How many occasions prior to that?

A. Several. I can't count them.

[826] Q. About what time was it when you got there to Why Nots?

A. Before dinner. I just don't remember what time.

Q. Do you know the man that runs Why Nots?

A. Yes, sir.

Q. Do you know him by sight?

A. Yes, sir.

Q. What do you call him?

A. "Bou."

Q. "Bou"?

A. Yes, sir.

Q. Bou, stand up, please.

Do you know this man right here, Mr. Loftis?

A. Yes, sir.

Q. And you know him as "Bou"?

A. Yes, sir.

Q. And does he run the Why Nots?

A. Yes, sir.

Q. Was he running it on February 13th, around dinner time, when you went in his place?

A. Yes, sir.

Q. What did you and Mr. Davis and Mr. Yates do there at the Why Nots arcade?

A. They have several machines there, you know, and we played some of the machines and, you know, just hung around down there for a while. Nothing in particular. Shot a [827] couple games of pool, I believe.

Q. By the way, where was that pistol, at this time?

A. It was in the car, under the front seat.

Q. Did you ever leave Why Nots, that day?

A. Yes, sir.

Q. About what time was that?

A. I am not sure of the time. It was a little bit after dinner.

Q. Where did you go, then?

A. We went to Haywood Mall. We went back to Mauldin to the apartment because I had to make a phone call to my girlfriend, and called her; then, we left and went to Haywood Mall.

Q. For what purpose did you go to Haywood Mall?

A. To see my girlfriend.

Q. Did she work at Haywood Mall?

A. Yes, sir.

Q. What is her name?

A. Kim Johnson.

Q. Did you see Kim Johnson, your girlfriend, at Haywood Mall?

A. Yes, sir.

Q. Where does she work?

A. The Ormond shop at Haywood Mall.

Q. What happened at Haywood Mall?

[828] A. We pulled up at the back entrance where I always come when I go to see Kim. I told them to wait on me a minute. I went inside, into the Mall, and was standing there talking to Kim where she works at. Dale Yates came in and he called me aside. I went over to him and he said, "We're going somewhere, we will be back in a little bit." He said, "be back at 5:00." I said, "Okay." I went back over there and was talking to my girlfriend. Mr. Yates left.

Q. Did you stay there at the Mall that afternoon after Mr. Yates left?

A. Yes, sir.

Q. Did Mr. Yates and Mr. Davis ever come back to pick you up?

A. No, sir.

Q. When did you learn of the incident at the Wood Store in Tigerville?

A. It was about 8:30 that night.

Q. Do you know about what time it was, in the afternoon, when Mr. Yates and Mr. Davis left your company there at Haywood Mall?

A. I would say—I can't remember—a few minutes before 3 or a few minutes after 3, because I remember my girlfriend went to work at 3. I had just got there and she had just got there. She had just clocked in when I walked up to her and started talking to her. No later than 3:00.

[829] Q. Did you see Mr. Davis or Mr. Yates anymore that day?

A. No, sir.

Q. Where was the pistol when you last saw it?

A. It was under the front seat in the car.

Q. The passenger's side or the driver's side?

A. The passenger's side of the front seat.

Q. Mr. Loftis, when you were first contacted by the police, do you remember talking to Sgt. Hitchins?

A. Yes, sir.

Q. When you talked to Sgt. Hitchins, did you tell him everything you knew about this case?

A. No, sir.

Q. What did you tell him?

A. I told him that I was drunk the night before; that I heard no conversation about it—

• • • •

[833] Q. Why didn't you tell Sgt. Hitchins about what you knew about this case when he first talked to you?

A. I was just scared I would get involved into the case and be charged.

Q. Have you ever seen a knife like this before?

A. Yes, sir.

Q. Where have you seen it?

A. It belonged to Henry Davis.

• • • •

Q. Back to the date of February 12th, you testified that you had some discussions?

A. Yes, sir.

Q. What was your state of mind, your mental condition—your condition generally?

A. I don't know how to put that in words.

Q. Were you high?

[834] A. Yes.

Q. You had been drinking?

A. Yes, sir.

Q. David, have you been charged with any crime in this case?

A. No, sir.

Q. Have you been charged with conspiracy?

A. No, sir.

Q. You haven't been charged with anything relating to this case?

A. No, sir.

Q. David, whose car was used in this incident?

A. In the trial, now?

Q. Yes.

A. It was Henry's, I believe.

Q. Whose knife?

A. I don't know.

Q. You don't know who had the knife?

A. The knife that they showed me?

Q. The knife that you testified about. Whose knife was that?

A. That was Henry's.

Q. Who was the driver of the car when you rode around?

A. Henry.

Q. Where was the gun the last time you saw it?

[835] A. Under the front seat—Well, I'd put it under the front seat on the passenger's side, in the front.

Q. Who was in the front seat?
A. Henry.
Q. And, who else?
A. Dale.
Q. Who was driving the car?
A. Henry.
Q. Thank you very much.

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EXCERPT FROM TESTIMONY OF WILLIE WOOD

• • • •

[911] Q. State your name, please.
A. Willie Wood.
Q. Mr. Wood, please speak up, because it is very important [912] that this jury hear what you've got to say.
Mr. Wood, how old are you?
A. 46.
Q. Where were you born and raised?
A. Tigerville.
Q. You've been working in Tigerville since you became an adult?
A. Right.
Q. What type of work do you do in Tigerville?
A. Run a general store.
Q. Is that general store called Wood Grocery—
A. T. P. Wood's Store.
Q. Your daddy testified earlier, Pralo Wood, is that correct?
A. Yes, sir.
Q. This State's Exhibit No. 3, is that a picture of the store that you have been running?
A. Yes, sir.
Q. How many years have you been running this store?
A. Well, I've worked in it ever since I was in high school but have run in fully by myself for the last 10 or 11 years.
Q. Your daddy kind of turned the store over to you?
A. Yeah.

Q. In your store, Mr. Wood, was part of it, on the side, set aside as a post office?
[913] A. On the left-hand side, as you go in the door.
Q. And it was actually a post office, wasn't it?
A. Post office. It has its own door.
Q. Who was the postmistress?
A. Helen R. Wood.
Q. Was that your mother?
A. My mother.
Q. And your mother had been postmistress up there for about 47 years, hadn't she?
A. Yes, sir.
Q. How old was your mother when she was killed?
A. 68 or 9, somewhere along in there.
Q. You and your mother worked together everyday in that store?
A. Yes, sir.
Q. Willie, on February 13th, of this year, were you working there in the store?
A. Yes, sir.
Q. Will you tell the jury and the Court what happened up there sometime around 4:00 or a few minutes after 4 on that Friday afternoon?
A. Well, I was standing, leaning up on the counter, next to the cash register, on the right-hand side, on my elbow. Two guys walked to the front door and come on in.
Q. By the way, was anyone else in the store, at that time, [914] besides you?
A. Mother was back in the post office, out of sight, because you couldn't see her. They walked on by the cash register, the first one did. I thought he was going to the drink box. I didn't even pay him any attention, and the next one stopped in front of me, and I looked him in the eye and was fixing to say, "What for you?" and he says, "Give me your money." I looked down and he had a gun. I said, "What money?" The guy on the left of the cash register hollered out, "I said, give me all of your money." I stepped down, to my left and looked at him. He had a

knife drawn like this, about 5½ to 6-inch knife. So, I opened the cash register, give him all the $20s. He said, "I said, give it all to me." I give him the $10s, laid them in his left hand. I said, "Do you want the $1s and the change?" He said, "No, I want you to bend over the counter." I looked at him and the knife and said, "No."

Q. When you handed this man—You were standing at the cash register?

A. Right.

Q. And the man with the knife was then to your left, across the counter from you?

A. Right, the check-out counter, on the left.

Q. And the man with the gun was to your right, across [915] the counter?

A. Right.

Q. You say you handed the man with the knife the money?

A. Yes, put it in his left hand, the $20s, the $10s, and a few $1s. I didn't give him no $5s.

Q. About how much money did you give him?

A. Roughly $3,000.

Q. Where was his knife, at this time?

A. In his right hand, in a stabbing motion.

Q. When you laid the money in his hand, could you just stack it up in his hand?

A. I just laid it over the top of his left hand.

Q. You said, "Do you want the change," or words to that effect, is that what you said?

A. I said, "Do you want all of the $1s and the change?" He said, "No, I want you to bend over this counter." I looked at him and looked at the knife and said "no," and stepped down, stepped down to kind of at the end of the meat box. Then, the guy on the right, with the glasses, he stepped down and pointed the gun at me and fired. I thowed [sic] up like this (indicating). I felt a sting on my chest. So, I looked back to see where the other guy was with a knife and he was standing at the end of the meat box, and he started around the meat box, down the

counter, on behind me, and I started out the front of the [916] counter, so I could get face to face with him again, trying to get my gun out.

Q. You had a gun on your side?

A. Right.

Q. You normally carried a pistol on your side when you were working?

A. Sometimes, sometimes not.

Q. What were you wearing that day?

A. I was wearing a London Fog short jacket, and it was new and kind of stiff, and it zipped up, and hard to get to, and, then, my hand was hurt to, see, and I was trying to pull up my coat and get it out.

Q. Did you have a shirt on under your jacket?

A. Had a shirt, a tee-shirt.

Q. When the man with the gun fired, did you see him before he fired?

A. I seen him aim and shoot and I felt a sting. I looked back—I didn't look at him no more—I looked back were the guy with the knife was. He was coming around the counter. I started toward the front of the counter, but when the shot was fired, Mama run out of the post office door. I heard the door slam. She hollered something. I don't know what, but he was on my back when we ended at the end of the counter before we go out in the aisle; and it looked like she reached her [917] left arm around and grabbed him. So, all three of us stumbled around the counter, out in the aisle.

Q. Out there near the front door?

A. Near the front door, in front of the ice cream box. She fell on her hands and knees. Well, I had my gun in my hand, then, and holding my hand up like this (indicating) and I started shooting and just pushing him on back until he couldn't go no further against the shoe boxes, there. The last shot I fired, he hollered and hit the floor and the knife fell out of his hand.

Q. What type of pistol did you have?

A. I had a Charter Arms, .38 special, 2 inch.

Q. How many bullets does it hold?
A. Five.
Q. Did you fire all five bullets?
A. All five.
Q. After you shot the man with the knife, what did you do?
A. I looked over at Mama and she was down on her hands and knees. She said, "I believe I am dying." I could see blood spurting out of the heart. I didn't say nothing. I went to the telephone, dialed "0" and told the operator to give me EMS and sheriff's office.
Q. Willie, is this the London Fog jacket that you had on that day?
[918] A. Yes, sir.
Q. Is this the shirt that you had on?
A. Yes, sir.
Q. And your undershirt?
A. Yes, sir.
SOLICITOR WILKINS: We offer these into evidence, at this time, Your Honor.
THE COURT: Any objection?
SOLICITOR WILKINS: They say no objection.

(State's Exhibit No. 12 received in evidence.)

A. I dialed the operator and told her to give me EMS and the sheriff's office, there has been a murder and a robbery. While I was on the phone, Dr. Meredith run to the end of the counter. I told him what had happened. He said there was a boy getting in an automobile out here, a certain color and everything. I said, "I didn't see no car." I said, "You come and get on the phone and talk to them." I went back around to see—Mama had done laid down nearly on her back. I looked at her and she was dead. I looked at him and he was dead.
Q. Mr. Wood, just before the man with the gun fired a shot at you, you threw up your hands a while ago. Would you show me how you threw your hands up.
A. (Witness complies.) The bullet went in there and

[919] come out here and hit my chest. Tore all the hide off my chest, but didn't go inside. The bullet fell in my pocket.
Q. Is that the bullet that you gave to your brother, Bobby?
A. Yes, sir.
Q. By the way, when you held your hands up, did you have your palm facing the pistol or the back of your hand facing the pistol?
A. Had it like this.
Q. Is that a picture of your palm of your left hand showing where the bullet entered?
A. Yes, sir.
Q. Is this a picture of your left hand showing where the bullet exited the back of your hand?
A. Yes, sir.
Q. And does this third picture show where the bullet hit you in the chest?
A. Yes, sir.
SOLICITOR WILKINS: I offer these into evidence, Your Honor.
MR. HENRY: Without objection, Your Honor.

(State's Exhibits No. 13, 14, and 15 received in evidence.)

Q. When this man was facing you with that pistol, Willie, and he fired, can you tell us exactly how many times he [920] fired?
A. Once or twice.
Q. You were hit once?
A. Right.
Q. Willie, is this your pistol that was on your hip at the time this incident occurred?
A. Yes, sir.
Q. Is that the pistol you fired five times at the man with the knife?
A. Yes, sir.

Q. Did you unload your pistol as you fired all the bullets it would hold, that is, five?

A. Yeah, I left the shells in it. I didn't take them out. I turned it over to the law officers when they got there.

SOLICITOR WILKINS: We would offer this into evidence at this time.

(State's Exhibit No. 16 received in evidence.)

Q. Were there any other pistols in the store of yours, Willie?

A. There was one, when I went back around, after I called EMS and the sheriff's office, I went back around and I noticed a gun laying in front of the ice cream box. At that time, I didn't know how it got there or whose it [921] was or nothing.

Q. Where was that gun normally kept there in the store?

A. Around the cash register.

Q. Right there, back behind the cash register?

A. Yes, sir.

Q. Was that gun fully loaded?

A. Yes, sir.

Q. Had it been fired?

A. No, sir.

Q. Is this that pistol, Willie?

A. Yes, .32 Colt.

SOLICITOR WILKINS: We'd offer this into evidence.

MR. MAULDIN: Your Honor, if I understand the sequence at this point. This gun was laying out in the room and had not been fired, and Mr. Wood does not know how it got there or anything, but it does belong to him?

SOLICITOR WILKINS: That is what he said.

MR. MAULDIN: If I could just simply request, if there is going to be any tying up of that, necessarily, I mean—

SOLICITOR WILKINS: There's—As a matter of fact, I will withdraw it. This, actually, has absolutely

nothing to do with this incident, but it is just a piece of evidence that happened to be found there.

THE COURT: All right, sir.

[922] MR. MAULDIN: Of course, we are not, necessarily, objecting to it, and we may ask Mr. Wood some questions about it; and, of course, Mr. Wilkins could offer it or not, but we are just trying to follow the situation.

THE COURT: All right, sir.

Q. By the way, Willie, after the police got there and your mother was taken away, did you and some of the officers and your father find a bullet hole in the back of your store?

A. Yes, sir, there was one found above—the back window, above a "Keep Out" sign, where the signs that I sell, it says, "Keep Out, No Trespassing" and all that, and there is a fresh bullet hole up above the "Keep Out" sign. You could see all the way through it, daylight, if you stand.

Q. Willie, I show you what has been marked State's Exhibit No. 5. Can you identify the man in that photograph?

A. Mr. Davis.

Q. You said that is Mr. Davis?

A. Yes, sir.

Q. Is this the man with the knife?

A. Yes, sir.

Q. Can you identify the man with the pistol, Willie?

A. Yes, sir.

Over yonder with the glasses, on the end.

Q. Ask the Defendant to please rise.

[923] (Defendant stands.)

Q. The man standing there, Willie, is that him?

• • • •

[924] Q. Go ahead and show us—just draw on there or trace on there, without using any mark, the direction that these two men took, as they entered your store.

A. The first one come down through here by the cash register. I didn't even watch where he went. The next one stopped on this side, facing me.

Q. Who was that? Was that Davis or Yates?

A. Yates.

Q. Put a "Y" there where Yates was standing when you first saw him. (Witness complies.) Now, where was Yates standing when he said, "Give me your money"?

A. Facing me. I looked him in the eye and started to ask him what for you? About that time, he said, "Give me your [925] money." I looked down and he had a gun pointed like this.

Q. And he was standing across the counter from you?

A. Right, on this side.

Q. Then, what happened next?

A. I said, "What money?" And, then, this guy, on this side over here, hollered out and said, "I said, give me all your money." Well, I stepped down to where I could see him, on this side of the cash register, and he was standing there with a knife, like this (indicating). So, I opened the cash register and handed it out to him in his left hand.

Q. Put a "D" there where Davis was standing there with the knife, when you handed him the money. (Witness complies.) Now, you are standing behind the cash register. How many times did you hand him money—you stacked it up in his hand, I believe you said?

A. Well, I know two times, but I must have given him three, because I give him some $1s, but I didn't give him no $5s. And I asked him if he wanted the silver and the $1s, and he said, "No, bend over the counter."

Q. When he said, "Bend over the counter," was he still standing there with a knife in his hand?

A. Right.

Q. What did you then do, Willie?

A. Well, I looked at him and I looked at the counter, and [926] I said, "No," and stepped back down here to the corner of this meat box.

Q. Draw a circle and put a "W" in it at approximately where you were standing there around the meat box. (Witness complies.) Now, what did you see Davis then do as you stepped back down the counter?

A. Davis come on down here, nearly to the end of the meat box, say, three-fourths of it.

Q. Put another "D" there. (Witness complies.) Now, what did you see the Defendant, Mr. Yates, do at this time, Willie?

A. Well, when I didn't bend over, he went back here; Yates stepped over here where he could see me, along in here.

Q. Put a "Y" down here in that circle. (Witness complies.) Now, you have a circle there with "Y-2" in it, Willie, is that the position Yates was in when he fired at you?

A. Yes.

Q. Were you facing him?

A. Yes, I was watching him.

Q. Is that when you threw up your hands in defense?

A. When he shot it, and I felt a sting on my chest.

Q. Now, after Yates shot—and you say he either shot once or twice, you are not sure how many times—what did you, then, do, Willie?

[927] A. I looked down here to see where this other guy was, Davis. When I didn't fall, he started around the counter. I started moving up this way fast, trying to get my gun. I come out up here and Mama come around this way and met him right there. We all met right here.

Q. Did Mr. Davis ever catch you before you got to the front of the store?

A. I'd say he was right on my back about the time I come out in the aisle, because I was on this side and he was in the middle and Mama was on this side.

Q. During the time you moved from the "W-2" position, where you were shot, to the front of the store, did Mr. Davis ever have any contact with you, ever touch you?

A. Not as I know of, except we got in contact up here.

Q. Then, what happened when you got, at this point—if you will mark here an "H" for your mother and a "W" for you, and a "D"—and I'll put a "3" by the "D" for Davis. That is where all three of you came together?

A. Right.

Q. All right, explain to us what happened then?

A. Well, one of us bumped this showcase over, off about that much off the counter, because it is narrow. We all stumbled around through here, scrambling and going on. She fell on her hands and knees, right here, and she fell. I had my gun out and I could see I could get to him, then. [928] She was out of the way. I started shooting and I kept backing him, I kept just going on against him shooting him and he still held the knife in a stabbing motion till the last shot. He never did say a word to the last shot. He hollered and fell on the floor and the knife fell, right here, on the floor.

Q. Did he hit the floor about where he is drawn there in the diagram?

A. Yes.

Q. When you fired the first shot, where were you approximately standing?

A. After she went down on her knees, I started shooting, because I couldn't do nothing for her on that side.

Q. Where was Davis standing?

A. Davis come on around—he was standing—I don't know where he—He was standing along in there when I started shooting the first shot, but I backed him to back over here till he couldn't go no further. I just kept shooting and walking and shooting, at the same time, and holding my hand up like this.

Q. Did he have that knife still in his hand?

A. He had it drawed [sic] that way when he fell.

Q. During that period of time while you were shooting, were you holding the pistol in your right hand or your left hand?

[929] A. Right.

Q. What were you doing with your injured hand?

A. To the best I know, I was guarding myself.

Q. Were you ever cut on the inside of your hand?

A. Yes, these three fingers; these main liters [sic] on these three fingers is cut. They were sewed back and straighten . . . .

COURT REPORTER: Would you speak up, please.

Q. Willie, after Davis fell, as you backed him along the front of the store, what did you do, then?

A. You mean after he fell?

Q. After Davis fell.

A. I looked at Mama and she was down on her hands and knees over here and I could stand and see the blood spurting out of her heart.

Q. What was she wearing?

A. She had on some slacks, cape, and what I call snow shoes, fur boots. When I looked at her and seen she was bleeding, I looked down at my hand and it was pouring blood. I know'd nothing I could do, so I went and dialed "0" on the phone and told the operator to give me EMS and the sheriff's office at once.

Q. After Yates fired at you, Willie, as you have already indicated to the jury, I believe you testified you, then, turned your attention to Davis?

[930] A. Yes, I didn't look at Yates.

Q. Did you see what Yates did after that?

A. No, sir.

Q. Have a seat. (Witness returns to stand.)

The area marked "W-2" on the diagram, the place where you were shot, after you left that area, as you

moved up the counter with Davis coming behind you, did you ever go back to that area where you were shot?

A. No, I stopped, first, at the phone. It was a little bit passed the phone where I got shot. I stopped at the phone when I went back. The phone is closer, hanging on a wall on a post.

Q. In fact, the phone is almost right behind the cash register, just about, isn't it?

A. Down just a little bit.

Q. When Davis told you to lean or bend over that counter, how was he holding that knife?

A. Stabbing motion, like this (indicating).

Q. How far away was he?

A. Well, he was standing up against the counter, because I was laying the money in his hand.

Q. Y'all were within two or three feet of each other?

A. Well, that counter is about as wide as the top of that counter, right there. He's leaning up against it on the other side.

[931] Q. Facing each other?

A. Right.

Q. When you moved down passed, to the meat case, you looked up and you saw Yates pointing the pistol at you, how was he holding the pistol?

A. Like that (indicating), just pointing it at me.

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[936] Q. When, what you have noted here as Mr. Davis' first position "D-1", is that correct?

A. Yes, that is when I give him the money, handed him the money in his hand, right here.

Q. Your attention was focused on him at that point?

A. Right.

Q. At what point did you change your attention and where were you exactly when that attention changed?

A. Well, I stepped down here, when I told him no.

Q. Did you also step back, as you did that?

A. I stepped back and down.

Q. Could you show me your approximate route?

A. Here is the cash register. I had it open, handing him the money across this counter. He told me to bend over the counter and I stepped down about along in here.

Q. Did you move back, first, and then down or did you—

A. I was angled. I wouldn't swear which way, but I know—I went up against the counter. I went back.

Q. When you got back there, your spot, were you . . . were you against this side?

A. In other words, the angle of the bullet—I wasn't behind the meat case—aiming the bullet, it didn't touch [937] the meat case, it went over. He was shooting—he was standing up here at what I call the candy rack, on this side, Yates was.

Q. You were closer to the meat case than you were to the shelves, right?

A. I was about in the middle of the aisle.

Q. So, where you have the "W", you say you were in the middle of that aisle?

A. Yes, right in there.

Q. Were you aware, at that point, that Mr. Davis had moved down in front of you?

A. Not at that point, but after he shot me and I looked to see where he had went, and he was here and I never did look at Yates no more. I watched him because he come around the counter and started after me, and I know'd he was going to stab me in the back.

Q. From the time that you turned your attention from Mr. Davis and moved back away from him, in the middle of this aisle, at the time of the firing of shots, how much time had passed, approximately?

A. Just a few seconds. The whole thing wasn't over two minutes long, from the time they come in the door, I don't guess.

Q. After the shot or shots—you said you weren't sure if there one or two, right?

[938] A. Right.

Q. —were fired, then you turned your attention, again, to Davis?

A. Yes, to see what he was doing. He was still standing back there with a knife. He started around the counter when he seen I didn't fall.

Q. From the time you felt the pain in your chest or burning, how long was it before you knew where Davis was?

A. Just as soon as I was hit, I looked to see where he was, and then I come back down toward the cash register, because I figured he was going to keep shooting. I wanted to get out of his line of fire, behind the cash register, and he would have to move one way or the other.

Q. So, Davis, by that time, right after the shot hit you, was already around the corner?

A. No, he wasn't around the corner when I got shot. He was standing down here where he was shooting, and he seen I didn't fall and then he come around the counter.

Q. That was immediately after the shot hit you?

A. Right. I looked at him and he started walking around—running like around this way and down that way.

Q. As soon as the shot hit you, do you know where he was going?

A. Did I know where Davis was going?

Q. Right.

[939] A. No, but I watched to see what he was going to do.

Q. When you came down the aisle?

A. Right.

Q. Pass the cash register?

A. Right. The drawer was left open.

Q. The check-out counter, the cash register, and back down the candy case?

A. Yes, all of us met right here.

Q. After the shot hit you, you didn't pay any more attention to where our client was, Mr. Yates?

A. Didn't watch him anymore.

(Witness returns to stand.)

Q. I think it might be better if you come down for my last question.

(Witness returns to front of jury.)

Q. One last thing for clarification. This circle that you have labeled as "Y-2", is that the position you saw him in when he—

COURT REPORTER: Would you speak up, please.

Q. —fired the shots?

A. Yes.

Q. (Repeat.) This circle that you have labeled as "Y-2", is that the position you saw Mr. Yates in when he fired the shots?

A. Yes.

[940] Q. Is that the last place you saw him?

A. Yes.

REDIRECT EXAMINATION BY SOLICITOR WILKINS:

Q. Mr. Wood, when the Defendant fired at you, was there anything between you and Mr. Yates to obstruct your vision?

A. No, sir.

Q. Did you look at him, as I am looking at you?

A. Yes, sir.

Q. Did you see him holding the pistol pointed at you?

A. Yes, sir.

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EXCERPT FROM TESTIMONY OF DR. EUGENE COX

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[954] Q. Dr. Cox, did you perform an autopsy on Mrs. Helen Wood?

A. I did.

Q. Would you tell us what injuries you observed before you began your autopsy?

A. If I may refer to my autopsy notes. Yes, I performed an autopsy on the body of Helen Wood on February 14th. At the time of autopsy, there was a wound

on the front part of the left side of the chest, in the upper part of the breast, just above the nipple area, a penetrating wound of the chest that was narrow and penetrated the full thickness of the chest by probe examination. There were no other wounds that I noted on the external surface of the body.

Q. This wound to her left chest, could you determine from [955] the autopsy what could have caused that wound?

A. Yes, sir, the wound seemed to have been caused by a rather thin, fairly narrow and sharp pointed instrument.

Q. I show you State's Exhibit No. 11, Dr. Cox—By the way, have you seen that exhibit before today?

A. Yes, I have.

Q. Doctor, the wound that you describe on Mrs. Helen Wood, did you find it to be medically consistent with having been caused by that knife you hold in your hand, State's Exhibit No. 11?

A. In my opinion, I feel that it could.

Q. Did you determine the cause of death of Mrs. Helen Wood?

A. Yes, I did.

Q. What was the cause of death?

A. The cause of death was the knife wound or the penetrating wound of the chest. It penetrated the left side of the heart and caused an enormous amount of bleeding into the sacs surrounding the heart and out into the left side of the chest.

Q. Would be be fair to say, then, in layman's terms, that Mrs. Helen Wood bled to death?

A. Yes, I think that is a correct assumption.

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EXCERPT FROM MOTION FOR A DIRECTED VERDICT

[1020] THE COURT: Well, then, Mr. Mauldin, I would tell you this. I will overrule your motion either to quash the indictment or to direct a verdict on the

murder charge for this reason: That indictment apprises you and your client that he's indicted for murder. It, then, sets out specific facts under which the Solicitor says he makes out a theory under those facts which substantiate the charge of murder and submit it to the jury. I agree that those facts substantiate and warrant a charge of murder under a couple of theories of the law. So, I would deny your motion to direct a verdict.

MR. MAULDIN: Your Honor, I would suppose that this hand-of-one, hand-of-all theory, would have to be one of those possibles.

THE COURT: That is one of the possibles.

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[1021] MR. HENRY: You mentioned one theory, the hand of one is the hand of all. Our position is a little more, specifically, would be that the hand-of-one, hand-of-all theory has to be, at least, some point participation where responsibility is cut off. That is what we are talking about here. At some point in time, in some point of participation and action, our client's responsibility would end. He would not be responsible for all consequences after initiation of the first act. In this case, we feel like, at this phase, [1022] the directed verdict phase, that we have shown that the killing which occurred happened beyond the foreseeable result encompassed by our client; and it is proved by the evidence of the State.

THE COURT: Well, you know the law on withdrawing from a conspiracy. You have got to quit before it gets started. You can't get about halfway through it and decide this thing isn't working out too well, I am checking out.

MR. HENRY: I, also, think that the law of conspiracy does not—the fact that they have gotten passed a directed verdict on conspiracy, does not—

THE COURT: Well, I don't mean conspiracy, per se, but I mean the agreement to do something. You have got to get out of it and let everybody know "I am through, now."

MR. HENRY: And it may be different if they had been indicted for conspiracy to commit murder, but they have not. We are not making motions on the ones that is conspiracy before the armed robbery—

THE COURT: But you perceive that the fact that your client might not have been in the store when the killing occurred is of great significance?

MR. HENRY: That, along with, what we can see is the fact, that he did not have cognizance of the presence [1023] of Mrs. Wood, period.

MR. MAULDIN: Your Honor, in fact, there is a principle in the law that says that presence at the scene of the crime is not enough, and we would say that in this case, we have absence from the scene of the crime. So, we are really distressed about that circumstance.

THE COURT: Presence is not enough, but it doesn't say that absence is enough to absolve your client.

MR. HENRY: Your Honor, there is another problem with the indictments. I think it goes to the directed verdict motion as well. We are put in the position, I think, of having to be sustained on a directed verdict for Henry Davis. I think that's the position the Court is putting us in. I don't think that is the law, that we have to prove that Henry Davis did not commit murder in order to have a directed verdict for Dale Robert Yates.

THE COURT: That, of course, would not be true if the facts were not as they are; of the facts that I have before me now that these two fellows walked in, each one of them armed with a deadly weapon, and that your client initiated the violence in that store by shooting first.

MR. HENRY: We are saying that as far as a directed verdict is concerned, as far as the foreseeable [1024] result is concerned, that he would not be responsible for all of the foreseeable results.

THE COURT: Foreseeable is not a proper term in the criminal law. It is reasonable that we are talking about, not foreseeable.

MR. HENRY: In the event that Henry Davis, in this case, had lit the dynamite and blew the building up, after our client was long gone, would he be on trial for murder of the people that were killed or for arson or—

THE COURT: I don't think he would be.

MR. HENRY: I think it is a matter of degree; it's a matter of timing.

THE COURT: Which is a matter for that jury.

EXCERPT FROM TESTIMONY OF DALE ROBERT YATES

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[1064] Q. How long have you known or did you know, prior to his death, Mr. Henry Davis?

A. About eight years.

Q. By the way, how old was Henry?

A. 28.

Q. So, he was five years older than you?

A. Yes, sir.

Q. Did you know Mr. David Loftis?

A. Yes, sir.

Q. How long had you known David Loftis before you were arrested and charged with this offense?

A. About five or six months.

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[1065] Q. Leading up to the couple of weeks prior to the incident, I want to ask you, Dale, you heard Mr. Loftis testify about riding around and looking at places to break into or steal from, didn't you?

A. Yes, sir.

Q. I want to ask you if during that last two weeks or ten days, prior to this incident occurring, did y'all do that?

A. Yes, sir.

Q. Tell me a little about that, what you would do?

A. Well, every couple or three days, we would ride around and look for some places we might could break

into, at night, while they was closed, some businesses or something; rob from there, we'd sell the stuff and get some money.

[1066] Q. You said you did that every two or three days?

A. Yes, sir.

Q. Did you ever have any discussion during those occasions about the possibility of trying to actually rob someone?

A. No, sir.

Q. I am talking about, when I say that, the distinction being that the person would actually be open for business and you would actually go in and require a person to give you something; do you understand?

A. I understand.

Q. Did you ever have discussions, for that ten-day period, say, about actually going into a place and requiring a person to give you money?

A. No, sir.

Q. Now, I want to ask you, Dale, some questions about the day before the incident that occurred at the Wood grocery. Do you recall--that would be February 12th or Thursday—the date before you were arrested—do you recall what you and Henry and David did that day?

A. Pretty much so.

Q. Give me some idea, basically, what you recall, as best you can remember?

A. We went out, we was looking at some more stores. We thought maybe we could burglarize after they was closed and sell whatever merchandise or whatever we found. We [1067] weren't having too much luck being a lot of places had burglar alarms and with the taped glasses and windows and such. We kind of, between us, decided it was really too hard. Everything was so burglarized, we couldn't get into them.

Q. So, at that point, what did you discuss?

A. That we might could arm rob someone.

Q. What type of weapon—Did you have a weapon of any sort at that point?

A. No, sir.

Q. Did David have a weapon that you knew of?

A. No, sir.

Q. Did Henry have a weapon?

A. He kept a knife in the car.

Q. So, after having discussed the situation, what did y'all decide, then, to do?

A. Would you—

Q. All right, once you discussed the idea of breaking into a place and deciding that the places were too burglary proof, then, you say there was discussion about going in and arm robbing somebody?

A. Yes, sir, robbing someone.

Q. What did you then decide to do to get ready for this robbery, if there was going to be one?

A. We decided we would need a gun to persuade whoever [1068] was behind the counter to give us the money.

Q. I want to ask you, do you remember, Dale, when you say "we decided that we couldn't burglarize the place" and "we decided we might need a gun," do you remember what role you were playing and what role David was playing and what role Henry was playing? What was the deal there? Were all three of you discussing it?

A. We were discussing it, but Henry and David was, more or less, going over it, and I would just kind of agree with them, you know, as far as—

Q. When y'all were discussing that, what role were you suppose to play in this robbery that was being thought about?

A. I was suppose to sit in the car and keep a watch out for the police cars or anything.

Q. Where were you suppose to sit in the car?

A. In the back seat.

Q. What was Mr. David Loftis, the man who came in here and testified yesterday, that never was charged with anything, what was he suppose to do in this robbery?

A. He was suppose to go in and get the money from the people.

Q. What was he suppose to take in?

A. A gun.

Q. What was Mr. Henry Davis going to do?

[1069] A. Drive the car.

Q. Whose car were you going in?

A. Henry's.

Q. When it was decided that you were going to need a gun, where were you going to get the gun?

A. From my brother.

Q. And whose idea was that?

A. Mine.

Q. So you—

A. We needed a gun and I just happened to know where we might could get one.

Q. So, you told them that you could get a gun from your brother?

A. Yes.

Q. About what time of day or night did y'all end up going to your brother's place?

A. Evening, just after dark.

Q. Describe to the jury the circumstances of going to your brother's house and what was said and who said it and where you were and so forth?

A. We were in Henry's car and he was driving, David was in the front seat and I was in the back seat. We went down to my brother's trailer, and he was coming across the yard. We hollered, "Hey, how are you doing?" We all knew each other. David said, "I need to go across [1070] town to buy some drugs." He said, "I want to take a gun with me to protect myself in case they try to rob us or anything." He said, "Can I borrow yours?" My brother said, "Yeah." He goes in to get his gun. We had a joint burning. I had it in my hand. I got out

of the car and stepped up into the trailer and handed it to him. He said, "Are y'all in a big hurry? Can you stay and smoke a while?" I said, "I guess we can stay a while." So, I told Henry and David to come on in the house and we sat down and smoked a couple of joints with my brother, and said we had to go on and get across town and wait for our drugs to come in. We left.

Q. A couple of questions with reference to that situation, Dale. Did y'all call your brother ahead of time and ask him if you could do that or did you just drive up?

A. Just drove up.

Q. Was there any discussion with your brother about when he wanted you to bring the gun back?

A. Well, we told him that being as we didn't know what time the drugs would come in, you know—they was coming from a different town—there was a big load coming in, you know, quite a few pounds—there is no telling when it would get into Greenville, and that it might be real late when we got done doing business, that he would [1071] probably be in bed asleep and we would just wait until the next day to bring his gun back to him.

Q. Dale, did you ever intend to go over to another part of town and buy any drugs?

A. No, sir.

Q. But, what you have related to the jury is what was told to your brother?

A. Yes, sir.

Q. In order to get the gun?

A. Yes, sir.

Q. When the gun was actually handed from your brother to somebody, who was it given to?

A. David Loftis.

Q. The fellow who testified in here yesterday?

A. Yes, sir.

Q. When you walked back out to the car, where did you get in?

A. The back seat.

Q. Where did Mr. Henry Davis get into?
A. Behind the wheel.
Q. And where did Mr. David Loftis get in?
A. The front seat, beside Henry.
Q. And where did David Loftis put the gun?
A. Under the seat.
Q. Dale, I know you are not an expert or anything, but [1072] referring to State's Exhibit 10, does that look like the gun that was given to you by your brother, with the holster?
A. Yes, sir.
Q. By the way, does this look like the knife that belonged to Henry Davis?
A. Yes, sir.
Q. What did you do, the three of you—Were the three of you still, then, together and you had gotten the gun from your brother, what did the three of you do, at that point, if you can remember—of course you can only testify to the best of your recollection, Dale, I understand that?
A. I believe we went back to Henry's apartment.
Q. What did y'all do the rest of that evening?
A. Smoked some pot and listened to the stereo.
Q. Do you remember doing anything particular that evening, other than what you've described?
A. No, sir.
Q. Do you remember where you, then, slept the night of February 12th?
A. On the couch.
Q. And you heard Mr. Loftis testify that he slept on the floor?
A. Yes, sir.
[1073] Q. Do you recall whether he, in fact, slept over there that night?
A. Yes, sir.
Q. And this was Henry Davis' apartment?
A. Yes, sir.

Q. What did you do then when you finished sleeping and woke up, give me some idea of what you did that next morning, February 13th, Friday?
A. Woke up, and I did what I usually do, the first thing when I wake up, I rolled a couple of joints and started smoking. Henry smoked a little and David smoked a little. I smoked the majority, myself. We had something to eat. We rolled up a few more joints and David and Henry joined in the smoking.
Q. Let me ask you, now, before you go any further with reference to the smoking and so forth. As far as—again, I am trying to establish the relative position that the three of you would take in your own relationships. When you would be together, who would drink the most, if you were drinking? Who tended to drink alcohol more than the other of you?
A. David.
Q. Who tended to smoke—If you were going to smoke marijuana, who tended to be more favorable to the marijuana and smoke the marijuana?
[1074] A. Myself.
Q. Did Henry drink very much?
A. No, sir.
Q. Did he smoke with you, though?
A. Yes, sir.
Q. When you got up that morning and smoked your marijuana, did you have any breakfast?
A. Yes, sir.
Q. Tell us about what happened as the morning went on and the afternoon came in?
A. Well, right after breakfast, I took the last of the speed I had and was smoking some more pot right after breakfast. Henry and David liked to eat before they started smoking. I like to smoke before I started eating. Smoked some more and rolled up a few and went down and got in the car and went looking for some suspectable [sic] places to rob. Went down through Log Shoals Road area, looked at a few stores down there.

Q. Stop right there. This was the morning or on toward the mid day of the 13th, the day that you ended up going to Mr. Wood's store, right?

A. Right.

Q. When you went into the Log Shoals area or the Donaldson area, whose car did you go in?

A. Henry's.

[1075] Q. And who drove it?

A. Henry.

Q. Where did you sit?

A. Back seat.

Q. Where did David sit?

A. Front seat.

Q. Where was the gun that you had gotten from your brother?

A. Under the front seat.

Q. If you had found a place to rob, what were the roles that the three of you were going to play. Henry was going to do what?

A. Drive, and just keep a lookout.

Q. Dale Yates was going to do what?

A. Keep a lookout for police cars or anything close around.

Q. Which way were you suppose to be looking?

A. The back, out the back glass of the car and to the sides.

Q. And what was David Loftis suppose to do?

A. Go in the store and ask for the money.

Q. Dale, when you were down in that area, was there ever any discussion about what would happen if David went into a store with the gun and the person just said, "No, I am not giving you any money," what was he going to do?

[1076] A. He was to leave, come out of the store and get in the car and we was to leave in a hurry.

Q. Was there ever any discussion about committing harm on a person because they wouldn't give the money?

A. No, sir.

Q. That is, in your presence, was there any such discussion?

A. No, sir.

Q. While we are on that subject of discussion, you heard Mr. Yates [sic] testify yesterday with regard to a couple of statements he had made—

A. Excuse me, I am Mr. Yates.

Q. I mean Mr. Loftis, I am sorry—You heard Mr. Loftis testify about a couple of statements that he said he made about, and the first one was, "I said something about you could get a lot of time for an armed robbery," Do you remember hearing him testify to that?

A. I remember the statement.

Q. Do you ever remember hearing him or Henry Davis, either one, talking about even getting caught, much less getting any time?

A. No, sir.

Q. Did y'all intend to get caught?

A. No, sir.

Q. Did you intend to get any time?

[1077] A. No, sir, we didn't intend to get caught.

Q. And if they wouldn't give the money to you, what was David suppose to do?

A. He was suppose to leave the store, get in the car in a hurry so we could leave in a hurry, because the people would, most likely, call the police, give a description, and they could stop us.

Q. Did you ever hear David Loftis, that morning or any other morning, say anything about the death penalty?

A. No, sir.

Q. When you were down in the area of Log Shoals or Donaldson Center area, and you say you were looking at these places—

A. Yes, sir.

Q. —tell me a little bit about that. Tell me basically where you went and what was said and what was done.

A. Went down Log Shoals Road and there was two small stores down there. We looked at them and they

looked pretty crowded, you know, they are the closest stores to the people in that area without having to go all the way to Mauldin. A lot of people were in and out down there. It was real crowded and we didn't want to stop there. We had just got started and we knew we had a lot more places to look at. So, we rode on over toward Donaldson Center. We looked at some places over there. They were sort of [1078] like the city type, and decided that if they didn't want to give the money to David, that we had to leave and had to get away from the area quick, even though we'd be leaving in a hurry, the people, when they'd call the police and told them that there had been an attempted robbery there, the police would be there soon because they would be close around, beings we was in the city or close to it.

Q. When you say that if they didn't give you the money and you had to leave in a hurry, I assume, if they had given you the money, you were planning on leaving in a hurry, too, weren't you?

A. Yes, sir.

Q. All right, I didn't want you to—the wrong impression there. So, as those discussions were taking place, did you ever actually make any attempt, actual attempt, to rob anybody during the earlier part of that day?

A. No, sir.

Q. What is the next thing you remember doing that morning or around the noon time period, at that point?

A. We left the Donaldson Center, riding over towards the Taylors area, and we went to Why Not's and stopped in there and shot some pool.

Q. Who were together at that point?

A. Henry, David and myself.

[1079] Q. Do you have any idea of perhaps how long you were there or the passage of time, at that point?

A. Maybe 30 minutes. I don't know. We shot three or four games of pool.

Q. What did you do then?

A. We left there and went down to Henry's apartment. David wanted to go down there and make a phone call. We went back to Henry's apartment, fired up a couple of joints while we was there, while he was talking. Then, he wanted to go to Haywood Mall to see his girlfriend. We rode up there. We stopped outside and he went in. We was sitting there in the parking lot. Henry said, "I am getting tired of all of this waiting and wasting time." He said, "We are suppose to have that gun back today." He said, "Go tell him to come on, we've got to go and get this over with." He said, "He can talk to her later."

Q. Wait a minute. Henry said to you to go tell him to, "Come on, we've got to get this over with," because you had to have the gun back?

A. Right.

Q. When he said, "Go tell him, so and so and so," what "him" was he talking about?

A. David.

Q. And David had gone inside the Mall?

[1080] A. Yes, sir.

Q. And you and Henry were suppose to be waiting on him?

A. Yes, sir.

Q. Were you still in the back seat at that point?

A. Yes, sir.

Q. What did you do when Henry said that?

A. I got out, walked in the store, walked up close to the store—there are so many stores in there—the store his girlfriend works in and motioned for him to come over there close to me. I told him that Henry was ready to go. We didn't have all day, you know, to be messing around. We had to get this over with and get the gun back. He said, "Well, I need to talk to Kim." He said, "You know, it is pretty important." He said, "How about y'all coming back about 5:00 and pick me up and we will go on and do it then."

Q. The "Kim" that you are talking about, is that Kim Johnson, the girl that testified in here yesterday?

A. Yes, sir.

Q. All right, go ahead.

A. I said, "Okay, I'll tell Henry." So, I went back out and told Henry that David had to talk to her and that it was important and for us to come back and get him at 5:00. He said that we could go look at a few more places and come back and get him. So, Henry said, "Well, get in. [1081] I got in the front seat. It was vacant. I said, "Well, where are we going. We done been all over a good bit of Greenville." He said, "Well, we can go out to the country spots like I was talking about." I said, "Are you going up toward 290, Willis' store, all the way toward that T. P. Wood's store and on up, if necessary, all around in that country?" He said, "Yeah, we will go look around up in there." So, we went over in that direction.

Q. Now, you were leaving the Haywood Mall, at that point. Do you have any idea, approximately, what time that would have been?

A. 3:10, 3:15. It might have been 3:05. Shortly after 3.

Q. What did you do, then, or which direction, basically, if you remember—who was driving?

A. Henry.

Q. Where were you sitting now?

A. Front seat.

Q. Do you remember what direction, specifically, that Henry took?

A. Not really. I mean, a lot of my time was occupied looking down, rolling up joints. I just didn't really pay any attention which way he was going. I have a idea which way we might have went.

Q. I want you to tell the jury the best you can recall [1082] the basic direction y'all went, whether you stopped or not, just as you were going up toward Mr. Wood's store, tell the jury basically which way and so forth?

A. We went to cut through the Taylors area, and from the Mall, there are several ways to get there. I don't really remember which way we took. We ended up in the Taylors area, around Highway 29. We went down 29. I believe we went up St. Mark Road, which runs into 290, and we took a left up 290, which goes to 25, toward Travelers Rest, the road that branches off of it, one of them is 253, that goes up to the Tigerville area. We was suppose to be looking at these stores over here, you know, if we seen one that we thought could get in and get away from quickly, we'd go back and get David and come back and rob that place.

We stopped at a gas station, Clark's station, and I went in and was looking around and bought two beers while I was there because marijuana makes you very thirsty when you smoke it, so I wanted something to quench our thirst. It was pretty crowded in there. I walked back to the car.

Q. Stop right there, Dale. You are talking, now, about Leonard Clarke's store. Have you ever seen that map before?

A. Just from a distance in here.

[1083] Q. During this case. Step down just one second so we can point out to the jury, basically, the position that you and Henry were at that point.

(Witness goes to front of jury).

This right here, this big dark line, is Highway 29, this is your Taylors area, and this is Greer area. This right here is 290, going up this way. Here is Leonard Clarke's service station. That is where y'all were at that point, is that correct?

A. Yes, sir.

Q. All right, go ahead and have a seat.

(Witness returns to stand.)

When you went into Leonard Clarke's store, did you have a gun with you?

A. No, sir.

Q. Where was the gun?

A. Under the front seat.

Q. Were you going in that store to actually commit any offense at all?

A. No, sir.

Q. When you left the store and went back out, where was Henry?

A. In the car, waiting.

Q. In the driver's seat?

A. Yes, sir.

[1084] Q. What did you do when you got there?

A. Handed him a beer. He said, "How did it look in there?" I said, "Well, it was crowded, but it might not be by the time we get back with David."

Q. So, you were still thinking y'all might still go back and get David, is that right?

A. Yes, sir, we was suppose to go back and get him at 5:00.

Q. Go ahead.

A. Henry said, "Well, we can ought to rob the place just as David can. I mean, all we got to do is go in and ask for the money and get it and leave or don't get it and leave."

Q. What else was said about that and, at this point, you are at Leonard Clarke's and you are leaving Leonard Clarke's place, still going north?

A. Yes, sir.

Q. Is that the first time that it had been brought up that you and Henry would be the two, only two, doing this?

A. Yes, sir.

Q. Tell the jury about that discussion, about how that came up.

A. When I came out of the filling station and got back in the car, Henry asked me how did it look in there, and I said, "Well, it is crowded right now, but it may be [1085] less crowded when we get back with David." He said, "Well, we don't, necessarily, need David. We can arm rob a place just as easy. All we have to do is walk in and ask for the money and they will either give it to

us and we leave and if they don't give it to us we leave, whatever."

Q. At that point, Dale, was there ever any discussion about harming anyone?

A. No, sir.

Q. Was there any discussion about—well, put it this way: If the person did not give you the money, or Henry the money, or whoever, what were you suppose to do?

A. Leave and get away out of the area quick, just as if we'd got the money. Just get out of there to avoid the police catching us.

Q. So, you left Leonard Clarke's store and then what did you do?

A. Continued on up 290 and there was some little—looked like a restaurant or something at a fork in the road.

Q. You don't know what the name of the place is, do you?

A. It seems like it had to do with Sandy Springs or something.

Q. And you, except for seeing this at a distance and so [1086] forth, you have never examined this map before, have you?

A. No, sir.

Q. Come down and see if they have put this place you are talking about on this map.

(Witness goes to front of jury.)

Here is Leonard Clarke's grocery, again. It is 291 going north. This is way up in Tigerville here. You are still coming up 290, can you tell us whether or not any of those places right in this particular intersection area might have been the place you are talking about?

A. I'd say this place right here (indicating).

Q. That is Sandy Flat grocery. You are not familiar with it other than riding by it that day?

A. That's it.

(Witness returns to stand.)

Q. When you got to Sandy Flat grocery, what happened then? Again, be sure that you project your voice toward the jurors because they have to hear every word you say.

A. It's in a fairly congested area. There is more stores there than one. There was a lot of people around. We just decided that wasn't a good place to go in and try. So, we had a little while left, we decided we'd go on up the road and look as far as North Carolina line, if we had to go that far. We knew of T. P. Wood's store, up there, and we knew there was some more stores up [1087] around that area.

Q. That intersection where Sandy Flat grocery area is, was that the first intersection or the first place that you two cased out, so to speak, after it was decided that the two of you would do it, instead of going back and getting David?

A. Yes, sir.

Q. And it was decided not to do anything in that area?

A. Right.

Q. What did you do then?

A. We took that right road from there, the right fork. And we continued on up through the country. I don't really remember passing any other stores til we got to the T. P. Wood's store. It seemed it was out where there wasn't anything around, no cars or anything. It looked like it was just sitting there. Wasn't a bunch of people going to be running in and out that we'd run into or anything.

Q. Dale, before you get into that, you said just a moment ago that you didn't remember passing any other stores. Is there a possibility that you could have passed some other stores and you just don't happen to remember them?

A. Oh, yes.

Q. Now, at the point you arrived at Tigerville, I want [1088] you to tell the jury, as specifically as you can, the actions of you and Henry in the car before you ever went into the store. Let's get that out of the way first. Which

direction and, again, Dale, this being the interior of the store and this being the road, like this, this would be going north and this would be coming back south. Which way were y'all heading when you passed the store?

A. North.

Q. When you passed the store this way, the store was on your right?

A. Yes, sir.

Q. When you passed the store the first time, did you stop the car?

A. No, sir.

Q. Did you ever pull the car up in between the gas pumps and the building, up in this area?

A. No, sir.

Q. Did you ever pull up in this area and sit in the car for 15 or 20 minutes?

A. No, sir.

Q. So, what did y'all do as you approached Mr. Wood's store, with it being on the right? What did y'all do?

A. We looked over at it. Wasn't nothing close to it, wasn't any cars in the parking lot, wasn't anybody coming in or going out. We didn't know whether there could [1089] have been customers inside or not, because you can't see inside. But there wasn't any cars outside.

Q. What did you do then?

A. We continued on going by it and it sort of like it starts down a hill, the road. Me and Henry was looking it over and said, "Well, what do you think about this one?" He said, "Well, it looks deserted. It's not crowded. Not anyone in the parking lot. We will go back and look at it."

Q. By the way, while you are on that particular subject, when you are sitting here in the road, and you keep on going pass the road, do you go downhill or uphill?

A. Downhill.

Q. So, from this point, going in that direction, is downhill, right?

A. Yes, sir.

Q. Which means that a person coming this way would be coming uphill, right?

A. Yes, sir.

Q. Do you know, Dale, and, again, I refer to this map, do you happen to know how far up the road, above the Wood store, y'all might have gone before you turned around, would you be able to say?

A. I can guess.

Q. Well, that will be fine if that is all you can do. [1090] But, looking at this particular area, being Tigerville, do you have any idea at what point you turned around, and if you don't, that's all right. I am just trying to refer to this as much as possible?

A. I seem to remember this creek.

Q. Did you go as far as the creek, then?

A. We turned around somewhere close to this creek.

Q. Who was driving, then?

A. Henry.

Q. When Henry turned the car around—When you were going downhill, did y'all pass anyone that you recall?

A. Yes, sir, there were a couple of people out jogging.

Q. As you passed these people, went down and turned around, did you then pass them again?

A. Yes, sir.

Q. Do you have any idea how far you were from the store?

A. Maybe a mile, I don't know.

Q. And they were jogging toward the store?

A. Yes, sir.

Q. Go ahead. Tell us what you did then.

A. Said we'd go in and look in this store, if no one in there, we can ask for the money and either get it or not get it and we can get back out because by the time these people running up this road get there, we are going [1091] to be gone anyway. It's going to take a minute at the most to be in the store. Maybe not a minute. Just

walk in and, you know, we didn't plan to be in there no time. We pulled in—I call it a parking lot—we pulled off the side of the road.

Q. Excuse me just a minute. Does that look like—referring to State's Exhibit 3—the store you are talking about?

A. Yes, sir.

Q. What did you do then? Where did you park?

A. In front of the store, just to the side of the road, but not in the lane.

Q. As best you can, show me and if necessary we will get down and show the jurors, at what point would you have pulled the car up? This being the front door of the store and this being the other front door in the post office area.

A. Right about here (indicating).

Q. Step down just a second and show these members of the jury first and we will come down.

(Witness goes to jury.)

With this pen, show the jury the three gas pumps right here, the front door of the store, here, and the front door of the post office down here, where, basically, the car was parked?

[1092] A. Right about here (indicating).

Q. Pretty much, then, directly in front of the front door that has the pumps in front of it?

A. Yes, sir.

Q. Have a seat.

(Witness returns to stand.)

Which way was the automobile, then, traveling, north or south?

A. South.

Q. Where were you sitting when you pulled up in front of the store?

A. In the front seat.

Q. Henry was still driving?

A. Yes, sir.

Q. Tell me what happened, then, Dale?

A. After we turned around and was coming up the hill, Henry told me to get the gun out from under the seat, you know, we was going in. I stuck it in my pants and that was while we was coming back up the hill passing the pepole, whatever, just after we'd passed them. We pulled in, stopped and got out, walked in, just like anybody else would. We went in and Henry went to the left of one counter and I went to the right of one counter. We wanted to look around to see how many people was in the building.

[1093] Q. Did you look around?

A. Yes, sir.

Q. And how many people were in the building?

A. One, besides Henry and myself.

Q. Right. Did you know that there was a lady in the building?

A. No, sir.

Q. What happened then?

A. What—

Q. What did you do when one went on one side of the counter and one on the other, walked down the counter to look around, then what did you do?

A. We was thirsty, so we was going to get a pepsi while we was there. The side I went down, they wasn't on and the side Henry went down, they was on. While we was opposite of each other, we seen that there was only one man in the building and he was behind the counter. There wasn't nothing around, you know, we could ask for the money, either get it or not get it, and leave, and it was so far away we could be out on any road before, you know, the police could get there.

Q. Go ahead.

A. We decided, yeah, we'd go ahead and see if it will work.

Q. Wait a minute. At what point was this "yeah, we'll [1094] decide and see if they'll give us the money."

How was that made, you were inside the store at that point, right?

A. Nodded affirmatively.

Q. Go ahead. Explain to the jury how that came up.

A. I was looking in one case and they had cokes and other drinks in there or something, and the side Henry was one, had pepsis and other different types of sodas over there. Henry said, "What do you think, does this one look like a good one?" I said, "Well, there is only one person in here." He said, "Do you want to try it?" I said, "Well, we might as well."

So, I come around to the side he was on and took a pepsi up to the counter and I pulled the gun out from the waist of my pants and told the man I wanted the money.

Q. Okay, now, was that Mr. Willie Wood that testified earlier in the case, in the brown suit, here?

A. Yes, sir.

Q. And you pulled the gun and told Mr. Wood you wanted the money, is that right?

A. Yes, sir.

Q. Then what happened?

A. He said, "What money?" I said, "The money in the cash register." He said, "There is not that much in there." I said, "I don't give a damn, I want the money." He mashed the button thing and opened it.

[1095] Q. Now, at that point, were you or Henry standing directly in front of this gentleman?

A. I would be to his right and Henry would have been to his left.

Q. So, he was on the other side of the counter, facing you, and you were on this side, and Mr. Davis would have been on this side?

A. Yes, sir.

Q. And Mr. Davis had the knife?

A. Yes, sir.

Q. What did Mr. Wood, then, do when he opened the cash register drawer?

A. He reached in and got the $20-dollar bills out of the little slot and laid them down on the counter and just

looked at Henry a couple of seconds and Henry said, "All of it." He got the rest of the bills out, the $10's, $5's and $1's. He laid them down on the counter. Henry picked them up and handed them to me.

Q. Henry picked up the money?

A. Yes, sir.

Q. And Henry hands the money to you?

A. Yes, sir.

Q. Go ahead.

A. I figured he was going to get the pepsi we set up there and we was going to leave. He handed me the money.

[1096] Q. What did you do when you got that money?

A. I looked toward the door just in case there was some very fast joggers or something or if anybody else was coming in.

Q. Did you have any idea or can you give the jury an estimate about how far you would have been, then, from the door, do you know at that point about how far you were from the door when he gave you the money?

A. Feetwise. 15 feet, I don't know. I'm not a good judge of distance. I'd moved a couple of steps up and looked and looked back.

Q. Go ahead. What happened? You had the money and you were backing and looking and backing and looking, what happened then?

A. Henry told the man to lean over the counter.

Q. Did you hear him say that?

A. Yes, sir.

Q. All right, go head.

A. He—Henry wasn't following me out. He was just standing at the counter and he had told him to lean over it. I didn't know, maybe he wanted him to lean over it so he couldn't get to a gun, you know, to give us time to get outside the building. I took a couple of more steps and was looking out the door, you know, to make sure we didn't run into anyone, would look back, you know [1097] letting the man know that I was watching him just, you

know, hoping that he wouldn't grab a gun and start shooting us; you know, getting time to get out the door. I was looking. I was pretty close to the door, then

Q. Do you have any idea, Dale, the distance—Did you ultimately fire the gun, by the way? Did you ultimately fire the gun?

A. Yes, sir.

Q. Do you remember how far you were from the door at the time you fired the gun?

A. Two steps, 6 or 10 feet. I don't know. About two steps.

Q. Go ahead. At this point, you are backing and going toward the door and watching Mr. Wood, and you heard the statement of Henry, then, what hapepned?

A. He said, "Lean over the counter." I was backing, I was doing this rather quickly, trying to get to the door and trying to watch what was happening back there. I didn't know what was going on. I just knew Henry wanted him to lean over the counter. He told him to. I figured he just wanted to kep him from being able to go under the counter and get a gun or something. So, I took a couple of more steps and Henry said, "Shoot!" I turned around and the man's hands was down, I figured he had gone for a gun. So, I leveled mine off at him and fired [1098] right quick and his hands started coming up and I just knew the man had a gun and was fixing to start shooting so I fired again. His hands came up empty. At that time, I heard a female voice say, "What's going on out there?" I said, "Let's go." I turned and took two steps and was out the door.

Q. What did you do, then, when you came out the door?

A. I ran around the front of the car and opened the passenger's side and sit (sic.) down and was waiting for Henry to come on out, you know, to leave. I sat the money dow non the seat and I had the gun setting there and Henry didn't come out. I was looking at the door, and I said, you know, he should have been here. Maybe

ten seconds had gone by, I don't know. I had done panicked by then. I'd done shot and hit a man with a bullet. Thangs had gone wrong and all. I was upset, scared, frightened. I don't know, I was very upset. I noticed the key in the ignition and I reached over and turned the car on. I looked at the door again and Henry wasn't coming out. So, I didn't know whether they had caught him or what. The man didn't seem to be hurt bad when I shot him. You know, he didn't just drop or anything like that. It seemed like it barely hit him or something. I mean, I wasn't even sure he'd been hit, as a matter of fact. I mean, I seen no blood or anything. I said, "Well, he [1099] caught Henry. He grabbed Henry. No use me staying here and getting caught." So, I jumped over under the wheel, put the car in drive, and left.

Q. Dale, you, then, were later caught down on a country road in that area, were you not?

A. Yes, sir.

Q. So, the testimony from the number of witnesses with reference to that is basically correct?

A. Yes, sir.

Q. I want to do one thing, Dale, so the jurors will have some idea when you are referring to—Dale, I am going to ask you to come down and from the time that the two of you—Now, first of all, to orient you to the store, itself, this is the front door into the grocery area and the three pumps. This is the door way into the post office area; this is the back area of the store. This is the bullet hole that apparently went out the back of the building. The ice cream box which sits right in front of the front door, just inside the door. This is the soda box. This is the counter on which the cash register is, the check out area, and meat case. I want you, first of all, to disregard all of these little markings on here. Those have been put by witnesses. I want you to testify as to where you went and what you did. Disregard that,

just pay attention to the actual [1100] model. From the point the two of you went into the store.

A. We'd have been stopped right here. We went in the store here. Henry went this way. I went this way. I stopped right about here, because I was looking for a soda, and Henry was on this side. There was one man in the building. He was right back here, and didn't see anybody else in the building. While I was looking here and Henry was over here, as testified to, Henry said, "You want to try it?" Just one person in there. We could ask for the money, either get it or not, and leave and get gone, because we figured these jogging people, it would take them some time to run up that hill. They was down near the bottom when we passed them.

Anyway, I came around this way, after we'd agreed to try it, and walked up to right here at this counter, and Henry stood right about here. I stood about here. I took the gun from the waist of my pants and told this man, standing right here, to give me the money.

Q. All right, now, he was behind the counter and you were on this side of the cash register, is that right?

A. Yes, sir.

Q. Go ahead.

A. Here is—

THE COURT: Mr. Mauldin, it is not necessary to go back through the entire testimony. I thought you wanted [1101] to point out places on there where he was.

MR. MAULDIN: I am.

THE COURT: But not just recount the entire oral testimony again, which is about what he's doing.

MR. MAULDIN: Your Honor, I would be surprised if we couldn't allow him to use the chart that the State had put into evidence to show the locations of the people—

THE COURT: Let him give the locations, but he's just starting in, now, with the entire oral testimony again, that he just gave. Why doesn't he just point to

the locations: Here I was when this happened, there I was when this happened.

MR. MAULDIN: Your Honor, if you wish to limit him, I, certainly, will instruct him.

THE COURT: Well, do you want him to testify twice, Mr. Mauldin. If you do, let him go ahead.

Q. Just tell where you were David.

A. Right here.

Q. Is that when you told Mr. Wood to give you the money?

A. Yes, sir.

Q. Where was Mr. Davis when Mr. Davis got the money?

A. Right about here.

Q. He was on the other side of the cash register from you?

A. Yes, sir.

[1102] Q. When Mr. Davis handed the money to you, what did you then begin to do?

A. He handed me the money, I turned and started up this way, looking out the door, this door here. I looked back and come back. I wanted to watch the man to make sure he didn't shoot me while I was trying to get to the door. I guess I was around in here somewhere. I heard Henry say, "Lean over the counter." I looked back and the man jumped back from Henery.

Q. Were you continuing to move in which direction?

A. I was coming this way, looking out the door, making sure I didn't run into anybody—I didn't want to completely just back out the door watching him, because somebody could have gotten me from behind. I wanted to watch both ways, so I kept looking back and forth.

Q. When you heard Henry Davis say, "Shoot him," where, approximately, how far from the doorway, then, were you?

A. About two steps away.

Q. Can you give us some idea on the chart there, your approximate location, the best you can recall?

A. Near the end of this candy case, along this area in here.

Q. Had you ever been in that store before?

A. No, sir.

Q. Have you ever been in it since?

[1103] A. No. One time I've been in the store.

Q. When you fired the shots, what did you then do?

A. I ran out this door.

(Witness returns to stand.)

Q. Dale, when you heard the voice, "What's going on out there?", did it appear or could you tell whether it was a male or female voice?

A. It seemed like a female voice.

Q. What did you say immediately upon hearing the voice?

A. "Let's go!" And I ran out the door.

Q. From the time you said that, did you ever have anything but your back turned to that door, until you got in your car?

A. Just my back. Like I said, I heard, "What's going on out there?" I said, "Let's go!" I turned and out the door.

Q. Did you ever, at any time, see a female?

A. No, sir.

Q. Would you know Mrs. Helen Wood if you saw her right now?

A. No, sir.

Q. Dale, I want to ask you if you had the occasion on a previous occasion to come to court, back on March 21, 1975?

A. Yes, sir.

[1104] Q. At that time, I want to ask you if you entered pleas of guilty to certain offenses?

A. Yes, sir.

Q. On that particular occasion, Dale, did you enter pleas of guilty to four counts of arson?

A. Yes, sir.

Q. And four counts of larceny?

A. Yes, sir.

Q. And two counts of housebreaking and larceny?
A. Yes, sir.
Q. How old were you when you went to court in March of 1975?
A. 17.
Q. Is that the first time you had ever come to big court?
A. Yes, sir.
Q. Why did you plead guilty to those charges when you came to court in 1975, when you were 17 years old?
A. I was guilty.
Q. Did you plead not guilty to the murder of Helen Wood in this case, Dale?
A. Yes, sir.
Q. Why did you plead not guilty?
A. I didn't kill Helen Wood.

* * * *

[1108] Q. Were you working back in February of 1981?
A. Yes, sir.
Q. Where were you working?
A. American KARO Corporation.
Q. Were you working on February 13th?
A. No, sir.
Q. Didn't work that day?
A. No, sir.
Q. Work the day before?
A. No, sir.
Q. How long had you been without a job prior to February 13th?
[1109] A. About two weeks.
Q. So, you quit working about February 1, 1981?
A. Well, I was fired, sir.
Q. And, Henry Davis didn't have a job either, did he?
A. No, sir, he was, what do you call it—I can't think of the word.

Q. He had a physical disability?
A. Yes, disabled.
Q. So, he didn't work?
A. No, sir.
Q. So, you had plenty time on your hands and very little money?
A. Yes, sir.
Q. During this period of time that you would ride around the county, daytime and the nighttime, with Henry and on occasion with Loftis, and talk about breaking in and stealing something?
A. Yes, sir.
Q. Committing housebreaking and grand larceny?
A. More like storebreaking and grand larceny.
Q. But, you never did that, did you?
A. No, sir.
Q. Because you decided that it was wrong to break in and steal?
A. No, sir.
[1110] Q. Because you figured you might get caught doing it?
A. Because there was a lot of burglar alarms on these places.
Q. And what do burglar alarms help do?
A. Help get the police there. They draw attention when you go in.
Q. And help you get caught?
A. Yes, sir.
Q. But you progressed from breaking in and stealing to committing armed robbery?
A. Yes, sir.
Q. On the night of February 12th, you suggested, "Well, if we're going to commit armed robbery, we had better get us a gun."
A. No, sir, that is not the way I said that.
Q. You suggested a way you could get a gun?
A. Yes, sir, that is what I suggested.

Q. And you took your friends over to your brother's house and you did accomplish what you took them over there to do?

A. Yes, sir.

Q. Get a gun. I don't believe there is any question about the fact this is the gun?

A. That looks very much like it.

Q. Old model gun breaks down in the middle like that?

[1111] A. Yes, sir.

Q. Carries five shots?

A. Yes, sir.

Q. It's a revolver?

A. Yes, sir.

Q. You had seen this gun before?

A. One just like it, I would say.

Q. You knew he had it?

A. Yes, sir.

Q. You knew where you could get your hands on a pistol if you wanted it?

A. If I could give him a good reason.

Q. Well, you thought up a pretty good reason, I guess?

A. Yes, that is what he had it for, as a matter of fact.

Q. You mean, to protect yourself if you are out buying or selling dope?

A. That, and if anybody broke in on him. He would have it there to protect hisself.

Q. Anybody broke into his trailer, you mean?

A. Yes, sir.

Q. You went over there that night and you got this gun, right?

A. Yes, sir.

Q. And you continued to talk about armed robbery that night?

[1112] A. Yes, sir.

Q. Over at Henry Davis's house?

A. Yes, sir.

Q. As you planned the armed robbery?

A. Yes, sir.

Q. And the next day, you went out driving through the county?

A. Yes, sir.

Q. Henry had some stores in mind, didn't he?

A. Yes, sir.

Q. You had some stores in mind, didn't you?

A. Yes, sir, just stores we knew where they was at, I mean, you can't help but know where stores are.

Q. Say, how about the store on Log Shoals Road, for example?

A. Yes, sir.

Q. You'd say, how about the one over behind Donaldson Center, for example?

A. Yes, sir.

Q. How many different stores you ride around to?

A. Five or six around that area. We looked at other stores on the way over toward Taylors.

Q. But first off that morning, you at least checked out five different stores?

A. Yes, sir.

[1113] Q. In the southern part of the county?

A. Yes, sir.

Q. Ride by and check them out?

A. Yes, sir.

Q. Get out, go in, and see who's there?

A. Yes, sir, if necessary. I think we went in one, but it was just to get some cigarettes. It was a Pantry and we didn't want to try to rob no Pantry.

Q. Why is that?

A. It's just right there on a main road, you know, a main highway went beside.

Q. You might get caught?

A. Well, yeah, because we might not be able to get out because of running into cars or something.

Q. Too much traffic along there and big plate glass windows in the store?

A. Yes, sir.

Q. You checked out at least five stores that morning? In the southern part?

A. I guess. I know of three for sure.

Q. And the plan was, you told the jury, that Loftis was suppose to go in with the pistol?

A. Yes, sir.

Q. In fact, it was riding around in the car with you all that morning, wasn't it?

[1114] A. Yes, sir.

Q. In this holster?

A. Yes, sir.

Q. Just like this?

A. Yes, sir.

Q. Loftis had it up there sitting between his legs?

A. It was under the seat.

Q. It was under the seat when you got it?

A. It was under the seat when I got in the car because that is where he had placed it.

Q. But Loftis never went in any store, did he?

A. No, sir.

Q. In fact, every time you came to a store, he would tell you why that wasn't a good one to rob, y'all would discuss it, too much traffic, too many people?

A. The three of us would decide.

Q. And Loftis, each time, each time, he indicated that he didn't want to rob that store?

A. For various reasons, the same reasons that me and Henry decided, too.

Q. But he was the person that was suppose to go in, wasn't he?

A. Yes, sir.

Q. But, each time he said, "This isn't good; I'm not going to do it. Let's don't do it."?

[1115] A. We would discuss it, and if the three of us decided it wasn't a good store, we wouldn't go in. I mean, if he decided separately on his own, then that would be all right, too.

Q. All right. That is what I mean. If he decided to go in any of those five stores you looked at in the southern part of the county, the plan would have gone off, you would have watched, Henry Davis would have driven the car, and Loftis would have gone in?

A. Yes, sir.

Q. Because the man going in with the gun had the final say so. He's taking the greatest risk?

A. Yes, sir.

Q. Each time Loftis said, "No," isn't that right?

A. The three of us decided, no.

Q. But each time he said no, you agreed with him, right?

A. Yes, sir.

Q. But you couldn't have made him go in any way, could you, if he didn't agree to do it?

A. No, sir.

Q. He had the final say so?

A. Yes, sir.

Q. Isn't that correct?

A. Yes, sir, I'll go along with that.

[1116] Q. He never would do it, would he?

A. No, sir.

Q. He gave excuses and all of you agreed, "Well, you're probably right. We had better not do it, too many cars, too many people, not a good location."

A. The three of us would give excuses.

Q. But each time Loftis gave an excuse, didn't he?

A. He would agree with ours or he would come up with one on his own.

Q. But, if he came up with one of his own, or he agreed with one of yours, that was it. But if he said, "We're not going to do it," it wasn't going to happen?

A. Right.

Q. And it didn't happen?
A. Right.
Q. He never got out of that car and went anywhere with a pistol, did he?
A. No, sir.
Q. Not in the southern part of the county, not up 291, not out on Wade Hampton and certainly not in the Tigerville area?
A. No, sir.
Q. In fact, after driving around that morning, you went to Why Not's?
A. Yes, sir.
[1117] Q. Got there about noon time or so?
A. Somewhere thereabouts.
Q. Shot some pool?
A. Yes, sir.
Q. Get something to eat?
A. No, we didn't eat there.
Q. Played some of the pinball machines or what?
A. Shot some pool. We might have shot a game or two on a flipper machine.
Q. Did you have a good time?
A. Fair I guess.
Q. Then, Loftis said, "Look, I want you to take me on out to Haywood Mall." Y'all rode on out there?
A. No, sir.
Q. Where did you go?
A. We went to Henry's apartment.
Q. Well, you went there very briefly and then you went to Haywood Mall?
A. Yes, sir.
Q. Loftis talked to his girlfriend at the apartment?
A. I imagine that is who he called. I didn't pay no attention to it.
Q. As soon as he hung up the phone, y'all left and took him to his girlfriend's?
A. Right.

[1118] Q. He went on in?
A. Yes, sir.
Q. He said, "Y'all come on back and get me later. I am staying," or words to that effect?
A. Yes, sir. It would have been about an hour and a half, I guess, I don't know what time it was. It was around 3.
Q. But he got out of the car and didn't get back in?
A. Yes, sir.
Q. Hadn't been any robberies going on that morning that you were involved in?
A. No, sir.
Q. Nor that afternoon?
A. No, sir.
Q. Loftis got out of the car and he left you and Henry?
A. Yes, sir.
Q. And he left you with two things, didn't he?
A. What two things?
Q. Henry's knife and your brother's pistol?
A. Yes, sir.
Q. They were in the car?
A. Yes, sir.
Q. Now, Loftis is out of the picture. He's gone. Stayed there at Haywood Mall with his girlfriend and you and Henry drove off?
[1119] A. Yes, sir.
Q. And you end up in the northern part of the county in Tigerville?
A. Yes, sir.
Q. But before you get there, you drive up St. Mark Road?
A. I think that is the route we took.
Q. St. Mark Road is listed on this diagram, is it not? I believe you pointed it out to Mr. Mauldin.
A. I didn't point out the St. Mark Road, but I believe I could find it.

Q. Well, it is marked on here, Mr. Yates, would you agree that the diagram of this map is correct, if this is Highway 29, this is St. Mark Road that leads up to 290 and goes right to Leonard Clarke's store?

A. Yes, sir.

Q. You are very familiar with that area, aren't you?

A. Yes, sir. Familiar with St. Mark Road?

Q. Yes, sir, that part that leads up toward Tigerville?

A. Fairly.

Q. Have you been up there before?

A. Yes, sir. I have been up that way going to Boy Scout Camp.

Q. And you have been up there on other occasions, too, haven't you?

A. We rode up to the mountains, going up 290.

[1120] Q. So, you know the area, generally speaking?

A. Not the area. I know a few of the roads up that way.

Q. Well, you know the main roads, like St. Mark Road, like Highway 290?

A. I am familiar with those roads.

Q. What I mean is you are not just in strange territory when you hit St. Mark Road, are you?

A. No, sir.

Q. You have been there many times before?

A. Yes, sir.

Q. You knew of the Wood store before this, too, didn't you?

A. I knew it was there. I passed by it going to Boy Scout Camp and up in the mountains.

Q. As a matter of fact, before the 13th, you had been up in that area checking out some of those stores to rob, hadn't you, to break into, you and Henry? Like Willis's store up there on 290.

A. I believe Willis's was as far as we went up that way, right around that area.

Q. That is at least halfway up to Tigerville, isn't it, Highway 29?

A. Halfway, I guess. I don't know. It didn't look exactly halfway.

Q. Well, you mentioned the Sandy Flat Grocery in your [1121] testimony.

A. We passed that on the way up there that day.

Q. Willis's store is less than a tenth of a mile from the Sandy Flat grocery.

A. We passed that on the way up there the day of the robbery.

Q. But you went up to Willis's store before that, checking it out.

A. Yes, sir, we had been up that far. Been riding different places looking at different places.

Q. To store break?

A. Yes, sir.

Q. To steal?

A. Yes, sir.

Q. This was before the 13th?

A. Yes, sir.

Q. So your travels in this area, though, were, on the 13th, nothing really new to you?

A. Not up St. Mark and 290.

Q. Do you remember, then, on that day leaving the Haywood Mall. In fact, you even remember going to the apartment and Loftis making a phone call before you went to the Haywood Mall, don't you?

A. Yes, sir.

Q. Going to the Haywood Mall?

[1122] A. Yes, sir.

Q. Talking to Loftis and he says he's leaving?

A. He said he was staying.

Q. He was staying and you were leaving?

A. Well, inside the car, he said he was going inside, if that is what you meant by leaving.

Q. You remember all of that?

A. Yes, sir.

Q. And you remember driving up Highway 29?
A. Yeah, I guess we took 29 through Taylors over to St. Mark.
Q. Driving up St. Mark Road and then going to Leonard Clarke's store?
A. Yes, sir.
Q. You remember Mr. Percy Rochester who testified yesterday?
A. I remember him from yesterday.
Q. Do you remember Mr. Leonard Clarke, the man you bought the beer from?
A. I remember him from yesterday.
Q. You don't remember him in the store?
A. Not really. I mean, I didn't pay any attention to him, really.
Q. When you went to Leonard Clarke's store, this is some time in the middle afternoon, is it not?
[1123] A. Yes, sir.
Q. You were checking that store out, weren't you?
A. Sort of, yeah.
Q. Well, you sort of, because you drove through there, pass the store and the parking lot real slow; do you remember that?
A. Are you talking about the Leonard Clarke store?
Q. Yes, sir.
A. We drove in and stopped.
Q. Do you remember stopping on out on the highway, where the front of your car is almost out on the highway?
A. We were off the road in front of the door.
Q. And you got out to go in and check it out?
A. Yes, I got out and went in to get us something to drink because we were thirsty.
Q. Just like you went in the Wood store to get you a pepsi because you are thirsty.
A. Yeah, you know, we were checking it out. We were suppose to go back and get David like I testified to, like I said. Me and Henry decided we would go ahead and check out some places.

Q. How do you check out a place when you go in? What do you look for?
A. That I don't know, just how many people work there.
Q. How many people, that is important, isn't it?
[1124] A. How many people work there.
Q. That really is the most imoprtant thing, isn't it? As far as going in a store, that is what you want to know, how many people work there?
A. Yes.
Q. If you go in there and see how many people are in there, that doesn't have anything to do with how many people that are going to be there at 5:00 that afternoon, does it?
A. Like I said in my statement, when I got back to the car, and Henry asked me how it looked in there. I said, "It is crowded right now, but by the time we get back with David, there might not be no one in there but who works there.
Q. As a matter of fact, you went in that store to check it out and you did and there were about seven or eight people in there, weren't there?
A. There was a few people in there. I can't give you a number.
Q. So, you bought your beer?
A. Yes, sir.
Q. Tried to be very pleasant to everyone, didn't you?
A. I was nice to them, yes, sir.
Q. Have a nice day.
A. Yes, sir, that is what I told them as I started out [1125] the door.
Q. You remember telling him that?
A. Yes, sir. I notice he said I said it twice. I remember telling him "have a nice day," once.
Q. How many beers did you buy?
A. Two.
Q. What kind?
A. Miller.

Q. Tall ones or short ones.

A. 12-ounce bottle.

Q. You bought two 12-ounce Miller beers, you remember that?

A. Yes, sir.

Q. "Have a nice day," and back to your car. "Henry, we better not get this place, too many people in there." Is the gun still under the front seat at this time?

A. Yes, sir.

Q. Then, you continued on up the road to check out another place?

A. Yes, sir.

Q. Around the Sandy Flat area?

A. We was riding up through that way, yes, sir.

Q. Do you remember riding by Paul Butler's store and checking that one out?

A. I never went in it, wherever it was at.

[1126] Q. Do you remember going by a store that was locked and you couldn't get in?

A. No, I never tried to get in any store that was locked

Q. Then you continued on up to finally you get to Tigerville?

A. Yes, sir.

Q. The truth of the matter is, you checked out and you knew where that store was, didn't you?

A. I've been by it, yes, sir.

Q. You pulled in there and stopped to check it out?

A. We passed it coming. I am not sure whether you are saying—Would you rephrase your question?

Q. Before you went in the store, you testified you drove down the road and came back. As you approached the store, going in a northerly direction, the truth of the matter is, you stopped there on the side to see what was going on?

A. No, sir.

Q. So, the only checking out you did of the Wood store is ride by and look?

A. We rode by and looked. There weren't any cars in the parking lot. We didn't think there was anybody inside. We knew there could be somebody that walked in. So, we decided we'd go back and look.

[1127] Q. You couldn't see inside the store, could you?

A. No, sir.

Q. You didn't know how many people were inside?

A. No, sir.

Q. When you did go in, your testimony, the first time you went in, both of you went in armed?

A. Yes, sir.

Q. That is the first time that has happened all day?

A. Yes, sir.

Q. Because the other times you went in the store was to check them out and you didn't take your pistol with you, did you?

A. No, sir. I was under—well, that's okay.

Q. Loftis, you and Henry, y'all had talked about what might happen when you go in a store to rob it, didn't you?

A. That they might not want to give us any money.

Q. And they might have a pistol under the cash register or under the shelf or something like that?

A. I don't remember ever discussing it, but—

Q. You knew it, though, didn't you?

A. I guess I knew there was a possibility. I mean, people have guns under the cash registers.

Q. And you knew that to be a common practice?

A. Some people, I guess.

[1128] Q. You testified what y'all were going to do is just go in and say, "Give me the money," and if they said no you were going to leave and if they said yes you were going to leave, is that right?

A. Yes, sir.

Q. What happens after an armed robbery is committed, as far as the victim is concerned? What do they do?

A. Call the police.

Q. Call the police, put out a description, describe the car, then you get caught. Isn't that what you testified to just a while ago?

A. You don't necessarily get caught.

Q. Your changes are great, though, right?

A. I don't know whether they are great or slim. I guess it would depend on where you were at for one thing.

Q. How quickly the victim can respond?

A. Well, we figured immediately if he said no; we figured immediately if he said yes.

Q. You testified earlier you went in and you were the first one that pointed that pistol at him, standing across the counter, and said, "Give me your money,"; is that correct?

A. Yes, sir.

Q. And he said no.

A. He didn't say no, he said, "What money?"

[1129] Q. Well, he said, "What money?" what did you say then?

A. I said, "The money in the cash register."

Q. Then you yelled, "Give me your damn money."

A. I didn't yell at him, sir.

Q. Well, you spoke in a voice loud enough for him to hear, didn't you?

A. Like I am talking right now.

Q. No need to talk too loud with a pistol in your hand, is there?

A. You don't need to talk loud for someone to hear you in the first place.

Q. So, you had to ask him for his money on your account at least three times?

A. I didn't ask him for it three times.

Q. How many times did you have to ask him?

A. Once.

Q. So, as soon as you said, "Give me your money," he began to pull it out and give it to you or give it to your friend.

A. Like you said, he said, "What money?" I said, "The money in the cash register." That's not asking for it, that's explaining what money he was talking about.

Q. When did you say, "Give me your damn money."?

A. Right after that. I didn't say, "Give me your damn money." He said, "There's not that much in there." I [1130] said, "I don't give a damn." You know, we weren't looking for a whole lot of money. We needed a little bit of money so we—

Q. But he was trying to put you off, "What money are you talking about?" "The money in the cash register." "Not much in there." "I don't give a damn, give it all to me." How long was this going to go on, do you think, before you made him give you the money?

A. Not long, you know, we was fixing to leave.

Q. If he had said no one more time, y'all were going to walk out the door?

A. I was answering the man's questions that he asked. I mean, you know.

Q. If he had said that there really was not enough money for y'all to worry about, you were going to say, "okay" and walk out?

A. "Well, if you don't want to give it to us, I guess all we can do is leave."

Q. Is that what you were going to do?

A. Yes, sir.

Q. Just turn around and walk through the door?

A. Not turn, but walk to the door, watching to make sure we didn't get shot going out.

Q. Oh, by that pistol he might have under the cash register somewhere?

[1131] A. There could be one in the store somewhere, under the counter or something.

Q. But there was never any intention to hurt anybody was there?

A. No, sir.

Q. Why did you need a gun and a knife?

A. Well, if you just walk into a store with nothing in your hand and tell the man to give you some money, he ain't going to give you nothing.

Q. Well, you had a gun.

A. You asked me why did we.

Q. Why did you need the knife, too?

A. That was what—Henry took his knife in. I guess he wanted to have something.

Q. He needed a knife in his hand with you standing there with a .38 pistol?

A. I can't answer for what my partner thought. I can't answer for no one's thoughts but my own.

Q. The truth of the matter is, you didn't want to get caught, isn't that right?

A. No one wants to get caught.

Q. And how is the best way not to get caught in an armed robbery?

A. To get away.

Q. And how is the best way to get away.

[1132] A. Not to be caught by the police.

Q. And that occurs when you don't leave anybody to call the police, right?

A. No, sir, that occurs when the police do not catch you.

Q. Well, if nobody ever calls the police, doesn't that enhance your chances of getting away?

A. I would say it does.

Q. Don't leave any eyewitness at the crime to call the police. You've got a free ride, right?

A. I would say so but I wouldn't agree to killing anyone. If Henry or David or anyone had said something about killing anybody, I'd not been with them.

Q. In fact, Loftis told you that morning that if you go in there and somebody gets killed, you get the electric chair?

A. No, sir, he did not say that.

Q. Well, what good was this knife going to do Mr. Henry Davis across that check-out counter?

A. I do not know. I guess he just took it in to help persuade the man in opening the cash register. I don't know. I didn't know he had it with him until he pulled it out. I mean, you know.

Q. He carried that knife in his car, didn't he?

A. Yes, sir, but I didn't see him take it out of the [1133] car.

Q. But you did hear him say, "Bend over the counter," didn't you?

A. Yes, sir.

Q. You knew what was going to happen, then, didn't you?

A. I figured he might have wanted the man to lean over the counter, so we could have time to get out of the door without the man grabbing any weapon that he may have had.

Q. Mr. Yates, if you don't mind, step down here just a second.

(Witness goes in front of jury.)

Now, you told your lawyers this is the first time you'd seen this map right here, at a distance, right?

A. Nodded affirmatively.

Q. How about this diagram, did you have an opportunity to go over it yesterday with your lawyers during breaks?

A. I looked at it, yes.

Q. Did you do some figuring on it yesterday, in this courtroom, while we were on a break?

A. I pointed to what I told my lawyers what happened.

Q. Would you go ahead and mark for us, mark "D.Y." exactly where you say you were standing when you fired those shots at Mr. Wood?

A. I don't think I can mark exactly.

[1134] Q. Do the best you can.

(Witness complies.)

A. End of that case somewhere.

Q. So, you were backing up from this position out here?

A. I was headed out toward the door. I was watching out the door.

Q. Your testimony is that there is no question about the fact you were headed out the door and you were at the back of that candy case where you drew that circle?

A. Somewhere in that area, up there somewhere. It is really hard to remember exact positions.

(Witness returns to stand.)

Q. Then, it is not a true statement that after you convinced Mr. Wood to open his cash register, after he had handed the money or at least Davis had the money in his hand and then he handed it to you, Willie Wood backed away, and you walked not toward the back of the store front, but toward Willie Wood, around that cash register so you could draw unobstructed beat on him?

A. No, sir.

Q. Your testimony to this jury about where you were standing up there at the front of the store is truthful?

A. Yes, sir.

Q. When you ran out of that store, you ran and got in the passenger's side, didn't you?

[1135] A. Yes, sir.

Q. Your car was parked just like Dr. Meredith said it was?

A. It was parked like I testified to. I don't remember the exact way he said.

Q. Out there in front of the store?

A. Yes, sir.

Q. Headed south?

A. Yes, sir.

Q. Keys in the ignition?

A. Yes, sir.

Q. Ready to go?

A. Yes, sir.

Q. Jumped in the passenger's side?

A. Yes, sir.

Q. Had that pistol—where was the holster?

A. In my waist.

Q. When you went into that store, you carried the pistol like this?

A. Yes, sir.

Q. In your waistband?

A. Yes, sir.

Q. Did you cover it up?

A. My shirt covered it, yes, sir.

Q. And when you pulled it out, you left the holster in [1136] there?

A. Yes, sir.

Q. You held that pistol in your right hand?

A. Yes, sir.

Q. "Give me your money."

A. Yes, sir.

Q. Looking him dead in the eye?

A. I looked at him, yes, sir.

Q. With the pistol pointed right in his stomach or chest?

A. About his stomach, in his general direction.

Q. Well, you were only a few feet away from him?

A. Yes, sir. Stomach, side of his stomach, something like that.

Q. You jumped in the passenger's side and you had over $3,000 in your hand, didn't you?

A. I had a lot of money, yes, sir.

Q. Had a lot of money, had a pistol, had the hoster?

A. Yes, sir.

Q. When your friend didn't come out of the store, that is when you started running?

A. Yes, sir, I expected my friend to come out of the store.

Q. That's when you got scared?

A. Yes, sir, I figured he got caught.

[1137] Q. What did you tell this jury your state of mind was when you jumped in that car?

A. Frightened, scared. I don't know the exact word to use or whatever, but I had just shot a man. That's the first time I ever shot anybody in my life. I wasn't sure that I had hit him, but he acted like I did. He started down toward the floor. It was real slow, like he was letting himself down.

Q. And you were frightened, upset, right?

A. Yes, sir.

Q. In fact, you were so frightened, you were so upset that you pulled away from there at a high rate of speed, right?

A. Yes, sir.

Q. Trying to escape?

A. Yes, sir.

Q. Avoid detection?

A. Yes, sir.

Q. Avoid apprehension?

A. I was trying to get out of the area, to get away from the police that was sure to be coming.

Q. And your state of mind was in such an upset position that you had the presence of mind to pull down a side road, get out of your car, take the money, the pistol, the holster, put in in a paper bag and walk up into the [1138] wood and place it there?

A. Yes, sir, I was scared when I left, I was scared when I was going into the woods.

Q. That was good thinking wasn't it?

A. I don't know, I didn't want the money and the gun in the car. I didn't even want it near me.

Q. Because that would tie you to the crime, if you got picked up by the police, right?

A. Not only that, but I had blood on the money. I didn't want it.

Q. You didn't want it around because it would tie you to the crime?

A. And the fact that it had blood on it. I didn't want nothing to do with it.

Q. Mr. Yates, as you drove down those country roads, what prohibited you from just tossing it out the window?

A. It would have been found, it might have had my fingerprints on it. Out there, it might have never been found.

Q. Placed it and covered it up with a few pine needles, didn't you?

A. I throw'd a handful on it. I started to cover it up, but I wanted to just get away from there, so I ran back to the car.

Q. Had it placed so later on you could go back and [1139] get it?

A. No, sir, I ain't even sure I could have found the place again. I don't believe I could.

Q. I have no more questions.

MR. MAULDIN: That's the case for Dale.

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EXCERPT FROM PROSECUTOR'S CLOSING ARGUMENT TO JURY

* * * *

[1169] Under the facts of this case, fate did step in and save Willie Wood's life, through no fault of Mr. Yates. But, in furtherance of that common design, Mrs. Helen Wood was stabbed and bled to death at the hand of Mr. Davis. Mr. Yates is equally guilty. The malice required was in his heart. He pointed a pistol and pulled the trigger. He was bent on murder, and his acts and the acts of Mr. Davis are one and the same, under the law. I submit to you—of course, His Honor is the final arbiter, but you listen to his charge—the hand of one is the hand of all.

Homicide that is committed during the furtherance of that common design, through the first step toward the commission of it, to get out of that car and walk in

that store, both armed with deadly weapons, from that point through everything that happens in the crime until there is a successful escape and the crime is [1170] over with and everybody has left, then it is all over with.

Had the murder of Mrs. Wood taken place at the store out by the gas pump, out on the road, in the post office, wherever it may have happened or could have happened, both are equally guilty, under the law.

The testimony of Mr. Loftis, which was not contradicted, either on cross-examination or by Mr. Yates, himself, was most important. I thought, what showed what was happening with these individuals prior to Helen Wood losing her life: planning, driving around, indiscriminately looking for a victim. Yes, Loftis was part of it or, at least, part of the conversation, but he got out of it, "take me to the Haywood Mall." I thought it was interesting, even Mr. Yates admitted Loftis had the final veto and he vetoed every store every time, because he was the one they said was going in and he wasn't going. "I've been to the penitentiary and you get a lot of time for armed robbery, and if somebody gets killed, you can get the chair. I ain't going in. Let me out." He did get out. What happened after he got out is what we are concerned about today.

How was the Leonard Clarke's store cased out? Differently from the Willie Wood store? Yes. What did they do at Leonard Clarke's? Drive in, slowly, looking [1171] and parked the car near the road. The activities even in the parking lot was such that Leonard Clarke said, "I was suspicious." I told my wife, "Hey, honey, watch out." Who stayed in the car at Leonard Clarke's? The driver and left the motor running. And Yates goes in. What does he see? A handful of people, so he buys two 12-ounce Miller bottled beers. Is that important? It tells you something about his state of mind. It tells you about his mentality. It tells us that he is not, in any way, deranged by anything; that he can remember back and tell you the type of beer he bought, as he described in somewhat detail the events of that entire day.

We move on up to Willie Wood's store. Eileen Stasney testifies. Why is her testimony important? Why should it be so contradicted by the defense? Two reasons: one, Mr. Mauldin told you, when he opened his argument to you, "I am going to prove that Yates never saw Helen Wood." Now he is on the spot. How is he going to prove it? The only thing he can do is have his client, Yates, deny it, "I didn't see her." That doesn't prove anything. Mr. Yates, on the stand, under oath, saying "I didn't see her," that proves it? A man with a criminal record as long as my arm who will steal and break in houses and burn down people's property. He wants you take his word for—

[1172] MR. MAULDIN: Excuse me just a minute, Your Honor, we take exception to that type of argument at this point.

THE COURT: Yes, sir, I overrule the objection. He is talking about the believability of the witness, the credibility of the witness.

SOLICITOR WILKINS CONTINUES WITH ARGUMENT:

Why is it important that you take back to your jury room a belief that he's telling you the truth, that they did not stop there on the side of that store, pass those gas pumps? They'd case it out as they did in other stores. Why? Because it was during that period of time that they were looking, and I am sure they were, they would have seen Mrs. Helen Wood pumping Mrs. Stasney's gasoline. They saw something else. They saw her leave and enter that store, not by the front door, but by the door down by the post office. So, what does that tell us? Somebody else is close by. Somebody is in, I submit to you, the store with a common wall, they thought. If you look at the post office, I guess it is a common wall, with the store they were going to rob. What does that mean? Bam! Bam! is going to be too loud. We don't intend to leave any witnesses in the store.

We can't afford to shoot unless we have to because of the noise it will create. Why else would Mr. Davis carry a knife in that store with him?

[1173] His confederate had a pistol loaded. If you believe him, all they'd say was "Give me your money," and if the proprietor said, "No," they'd turn and walk out. But no, they went, and I submit to you, under the facts of this case, with the idea of stabbing the proprietor to death; a quiet killing, with the pistol as a backup.

Why is that submitted to you? Did they wear a mask? Did they try to conceal their identity? Were they in a real big hurry? Did they, as in the other cases, leave Mr. Davis behind the wheel, like at Leonard Clarke's, with the engine running for a quick get-a-way? No, because it wasn't going to be necessary. Because if you kill quietly, nobody knows, and you can make a successful escape back to Greenville with the greatest of ease.

Willie Wood testified—I guess you are going to have to, somewhat, compare his testimony against Mr. Yates. Willie Wood, the man who works for his living, runs a country store, who is a credit to our community—I guess his country store is really a part of the whole American symbol. He says I was there behind my counter and these two men walked in. Oh, they didn't walk all behind the counters as Mr. Yates said. They didn't get any pepsi colas as Mr. Yates said. "We thought we would get us a pepsi cola because we were [1174] thirsty," just before they committed this armed robbery. No, he said, "One walked straight passed me, and the other walked right up to where my arm was resting on the counter." I think you will remember, his back was to you like this and he held his arm up as he rested on the counter. "I got ready to say, 'What for you?' and I looked up and he said, 'Give me your money'." That was the man across the courtroom from you and me that held that pistol on him. "Give me your money." The first violent words spoken came from the mouth of Mr. Yates, "Give me your money." "I don't give a damn, give me all of your money," or words to that effect.

Then, Mr. Davis joins in, on the other side of the cash register, with a knife in his hand and Willie starts putting the bills out. "Bend over the counter." What does that mean? What does that mean? Pat him on the back and say, "Have a nice day." Stab him in the back is what that means. Kill him quietly. Willie knew what it meant, so he backed back to get away and he's out of range of the knife blade. There is a counter between him and Mr. Davis and he's backing down that counter. What does he say Yates does? Yates moves toward the front door? No! He moves around the cash register, toward him, as he backs away. He looks up and he sees Yates like this and he throws his hands [1175] up, BAM! Didn't hear the second shot, for sure, but we know there was another shot, BAM! Yates tells you a different story. You've got to believe him, not necessarily to find him not guilty but, I submit to you, the attorneys will argue to you, he was trying to get away from all of this criminal conduct, this unlawful design. He was moving toward the front door, trying to get away. Had no intention of harming anyone. He only fired when he heard Davis say, "Shoot him!" And he turned from the front door and shot him.

That is where the angle of the bullet becomes important. The expert, Paul Stombaugh, almost 30 years of experience and 19 of them in a FBI criminal laboratory, over 200 cases involving bullet angulation, testifying as an expert, not only today, but in days passed in this very courtroom, says, "I can tell you the angle of that bullet." Of course, common sense dictates you can't use sunlight to tell you, because once a bullet enters through one panel, the angle, then, can be changed. He drew the angle of that bullet, and it is not just like Willie Wood said. No question about it, but it shows this, without any question, it shows two things: That Willie Wood was moving down from that cash register, away from the cash register, toward the interior of the store, trying to escape that knife.

[1176] It shows another thing, without any question, that Yates, instead of moving toward the door, was moving in the direction that Willie Wood was moving. Moving toward him, as Willie backed up to get a good sight of the other side of the cash register because of the cigarette racks and so forth.

After Yates moved down where he could see Willie Wood, you can see that his friend, Mr. Davis, was not going to be able to kill him quietly, because they were going to leave no witnesses. He did what he thought would accomplish their mission, to take the life of Willie Wood, the only eyewitness as far as they knew. And he thought he had. As you recall, he testified, "When I shot, I saw him start to go down slowly." And he turns and runs and gets in the passenger's side of the car, expecting Mr. Davis to follow him out of the store. But, as you recall from the testimony, Davis is further down into the store, almost to the end, down there by the meat counter. He sees something Yates doesn't see. He sees Willie Wood does not fall all the way. He sees Yates' bullet is not going to kill Willie Wood. So, what does he do? No eyewitnesses. They can be easily identified. Criminal record, mug shots, they know it. So, what does he do? He goes after him to finish the job. Willie does the only thing he can do, [1177] he tries to protect himself and get away from that man coming at him with a knife. He gets to the front of that counter and his windbreaker is on, zipped up, one hand with a bullet hole all the way through it, bleeding profusely, shot in the chest, trying to get his pistol out, to protect himself and his property. And his mother hears something that is not right in the store. His 67-year old mother comes to fight for her son.

As Willie said, they met there and his mother, it appeared, tried to grab Mr. Davis. And Davis, consistent with what the pathologist said, plunged the knife into her chest, sideways, penetrating not only the rib cage, but the heart as well. Willie said that he could see her heart pumping the blood out. He finally has his pistol

out and he backs Davis to the side of the store by the shoe boxes shooting him until he falls.

Mr. Yates is now attempting to make an escape and he's got a lot of presence of mind about him, to get rid of the evidence that will tie me to the crime because something didn't go right. Maybe we did leave an eyewitness there. So, get rid of the money and get rid of the gun and so forth. But he's not just going to chunk it out the window. He's going to keep it. He takes it up to the woods and hides it and covers the [1178] bag in pine needles, comes back out of the woods and sees the wrecker driving down and he stoops down then, trying to conceal himself.

Because of good police work in Greenville County by a sheriff's office, he was apprehended because they did the right thing. They fanned out in a perimeter, watching the major roads. In just a few minutes, in just a few miles, Yates was apprehended.

Is there a reasonable doubt in your mind, Mr. and Mrs. Jurors. The Judge has charged you on this yardstick that you'll have to use. He said reasonable doubt means a real reason, substantial doubt. Can there be not only a substantial doubt, but any doubt as to the guilt of this man in these four indictments. It makes no difference who actually struck the fatal blow, the hand of one is the hand of all. This is the law.

EXCERPT FROM DEFENSE COUNSEL'S CLOSING ARGUMENT TO JURY

* * * *

[1180] It is generally accepted there are several facts that have been proven by the State and conceded by the defense. There are several of these as I am sure you are well aware. Henry Davis, David Loftis, and Dale, all involved in this lifestyle as has been testified to. Mr. Loftis separated himself as some later point and did not participate in the armed robbery, although he talked [1181] about it and discussed, conspired, if you will. He

did not go to the store. He conceived that Dale was in the store and Henry Davis was in the store. Dale participated in the armed robbery and used a gun. He shot Willie Wood. No question about that. Henry Davis went after Willie Wood. No question about that. Henry Davis killed Helen Wood. No question about that. Dale left in the car, at some point, or rather escaped, if you call it that, as has been testified. No question about there.

There are, however, several points as you begin to focus on the important issues of the murder indictment, and I want to draw attention to now. What did Dale agree to do in these cases? He agreed to commit armed robbery. The question you have, did he agree to commit murder? Well, if he had agreed to commit a murder, if there were facts and evidence that tend to show that, I submit to you, along with the other indictments, you would have the indictment for conspiracy to commit murder. No such indictment exists. That should speak for itself. I want you to consider that very strongly. That is part of the requirement you have when you look at the murder indictment of weighing both the mental state and the actions of Dale Yates. What did he think, what did he agree to, are his actions consistent. Are his [1182] actions consistent with armed robbery? Are his actions consistent with murder?

Mr. Wilkins suggests that at some point Henry Davis and Dale intended to leave no live witnesses. Fortunately, we have evidence to view which shows that to be impossible or inconsistent positions. Consider the gun, consider that two shots were fired, consider the uncontroverted testimony that the gun had five bullets. Three live rounds remained. Now, if Dale was the shooter who intended to leave no live witnesses, what would have prevented him from firing the rest of the rounds and being sure there were no live witnesses, or is the fact that there were three live rounds left in the gun consistent with two quick shots and an exit. He left the store while the man was still alive. From Willie Wood's own testimony, he was

standing . . . he was standing behind the counter which you could see over it. If you remember his testimony about the different heights and levels of the counter. You could see over that counter.

There is evidence that suggests that Dale fired in response to the shout of his partner. He was backing up to the doorway. Now, the positions that Dale took inside the store have become a critical importance.

The Solicitor, in his argument, did not use his [1183] exhibit here on the floor chart, which I would like to at this time, if you all can see. Why is this important? Of course, it is important because if the facts tend to show that Dale took two shots and was actually leaving the store, tends to support our position. If, as it is contended, he was standing next to the counter, as states their position.

Now, Willie Wood's testimony was that he was standing—he, Willie Wood, was standing—behind the meat counter, about in the middle of the aisle. Dale Yates, the last time he saw him, was standing right beside the cash register. Dale's testimony places him down at the end of the counter, in this area, and I believe his testimony was he was not exactly sure of the precise spot.

In an effort to clarify this testimony, defense p[illegible]d evidence, common sense evidence, if you will call it that, from our investigator, having been out to the scene and looked at the bullet hole. Our evidence tends to show general support for the angle and position that Dale testified to, not precisely, but approximately.

Now, in reply, mind you, not in the main part of the case, but in reply, this evidence that Paul Stombaugh testified to in discovery, apparently several weeks ago, [1184] did not present until reply, tends to show a line of path it traveled, along this area, along this blue line. Look at that blue line carefully in your deliberations. How can it possibly be consistent with the remainder of the testimony presented by the State. Willie Wood testi-

fied he was here, the line of travel when he was shot was suppose to be here.

We submit that our position on the path of the bullet is as consistent as the testimony is of Willie Wood. We suggest to you that this expert testimony is inconsistent with the rest of the State's case. As far as his relative movements, Dale's relative movements, that is the next point. Got him in the store, fired the shots and what happened next. That is critical to the case. The Judge will charge you the law. What did he do then? What is consistent? What is consistent with all of the testimony? According to Willie Wood, the last time he saw Dale Yates was at "Y-2" on the chart, that was in front of the counter. According to Dale, he fired the shot down closer to the candy case, closer to the door.

Now, it is not inconsistent—It is consistent with Willie Wood's testimony that Dale Yates left in a hurry. Consider that, according to Willie Wood, Henry Davis chased him back d[illegible] the counter, down [1185] this route. If Dale Yates were still in the store, he would have had to have seen him face to face, across the counter. We submit to you the only reasonable explanation was that he was gone at that time. That becomes critical. What I am suggesting to you, you don't have to just accept Dale Yates's testimony, you can accept Willie Wood's testimony, which is consistent with a quick shot, a quick exit.

What did he do then? What did Dale do then? According to his testimony, he got in the passenger's side of the car, waited a few seconds and rode off. According to Dr. Meredith, he saw a man get in the car, wait a few seconds, and ride off. Consistent with the State's own position.

I want to make a comment, a general comment, on the law. The Judge will correct the law at the proper time. Neither Mr. Wilkins or myself are here to give you the law as it is going to be. The Judge will tell you what it is suppose to be in his charge on the law at the proper time. Do not get the impression that every person who is

involved in armed robbery will necessarily be responsible for all consequences, under any circumstances. I submit to you that that is not the law that the Judge will charge you. Each case will stand on its own.

[1186] You may find, for example, that the actions of Henry Davis were done after Dale Yates had left the store. That is an important fact. We submit to you that the evidence does show that. The absence of the State's evidence to the contrary, and the positive evidence testified to by Dale Yates, in addition to expert testimony about the path of the bullet. If that is the case, then there is a difficult decision for you to make as to what his relative responsibility was for the killing of Helen Wood.

The Judge will charge you on murder. The Judge will charge you the law on murder and tell you what murder is in this state. He will tell you about intent. We submit to you that the facts in this case, taken as a whole, indicate that Dale had no intent to kill Helen Wood. The Solicitor has, by implication, I believe, argued that the intent Dale may or may not have had to shoot Willie Wood is there. We don't have any objection to that, no problem with that at all. But the idea that it would apply, that is, that the same intent would apply to the killing of Helen Wood is not the law, we submit.

Henry Davis's actions were separate, distinct, independent, if you will, it was spontaneous; not planned, not agreed, not contemplated. It was not part [1187] of the plan or common purpose of design that Henry Davis and Dale entered into. Henry Davis, in killing Helen Wood, acted alone. It is basic to our principle criminal process. The people are responsible for their acts. It is equally basic that someone not be responsible for other persons' acts. That principle applies in this case. It was interesting to me that Mr. Wilkins mentioned Mr. Mauldin's earlier promise to the jury, that we would prove that Dale never saw Helen Wood. It was a bold promise and I submit to you, under the facts of the case, upon all the

evidence, that it's a relevant issue to the law of the case and it's a promise we have kept.

Thank you very much.

EXCERPT FROM JURY INSTRUCTIONS

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[1200] Ladies and gentlemen, a most important rule of evidence that obtains in this state is this: Any defendant who is charged with the commission of any crime and brought into this courtroom to answer for it is presumed by the law to be innocent, and that presumption of innocence would remain with him throughout the [1201] trial and even when you go to your jury room, and it would remain with him until the State has proven beyond a reasonable doubt that he is, in fact, guilty of one or more of the charges made against him.

I tell you that that burden of proof by the State and by which you must be convinced is made up or consists solely of the evidence which you have heard from that witness stand or exhibits which have been placed before you and which you will have with you in your jury room and, of course, the law as I explain it to you within the context of which the State must prove this guilt beyond a reasonable doubt. It is from evidence and testimony presented in this courtroom that you must be convinced beyond a reasonable doubt, before the presumption of innocence which clothes him from beginning to end of the trial could fall away from him. That is not merely a theory that some lawyer thought of, it is a very substantial right that every citizen in South Carolina is entitled to.

I am confident that when you go to your jury room, you will give this Defendant the benefit of the presumption of his innocence.

Ladies and gentlemen, the burden of proving the charges made against this Defendant rests on the State of South Carolina; in this case, Mr. Wilkins, who is [1202] the Solicitor here and his assistant, Mr. Traxler,

are required by the law, that is, the burden that we are talking about; they are required to present to you evidence, exhibits, by cross-examination of any of the witnesses; they must present before you competent evidence which establishes, beyond a reasonable doubt, the material elements of each of these charges before you could convict the Defendant of any of these charges.

The Defendant does not have to prove that he's innocent. He does not have to disprove that he's guilty. The State must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant.

Ladies and gentlemen, reasonable doubt is a phrase that you have all heard, and it means the same thing in the law as it does in ordinary, everyday English language; that is, a doubt for which you have a real reason. However, that excludes fanciful doubts or whimsical doubts, because anyone could doubt any proposition if you wanted to, but reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason. So, it's to that degree of proof that the State must prove the elements of these charges. When I begin explaining the individual elements to you, bear in mind that it's the State's burden to [1203] establish these to you by that degree of proof which I have just defined.

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[1206] I tell you that a deadly weapon, within the meaning of the law, is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

Ladies and gentlemen, the State also charges that on February 13th, the Defendant, Dale Yates, committed the crime of murder in Greenville County. Madam Foreman and ladies and gentlemen, murder is the unlawful killing of any human being with malice aforethought, either expressed or implied; that is the definition of murder in South Carolina.

[1207] In order to convict one of murder, the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought, and such proof must be beyond any reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" or "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.

Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an [1208] unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make

a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before a commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be a combination of a previous evil intent and the act which produces the fatal result.

I tell you, however, that the State is not required [1209] to prove any motive for a particular killing.

Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present, participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused [1210] which proximately lead to the accomplishment of the criminal purpose. The commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commis-

sion of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, [1211] nothwithstanding any attempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with a resulting lack of responsibility for a homicide committed by a confederate.

I tell you, however, that withdrawal from the scene of the crime may be considered by you along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

SUPREME COURT OF SOUTH CAROLINA

No. 21835

THE STATE,
Respondent,

v.

DALE ROBERT YATES,
Appellant.

Dec. 23, 1982

PER CURIAM:

Appellant, Dale Robert Yates, was indicted and convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. After being found guilty of murder, the jury recommended at the second phase of the bifurcated trial, that he should die by electrocution. From these convictions and sentence, he appeals. The basic issue involved in the appeal is whether the death sentence should be carried out.

On February 12, 1981, David Loftis (not on trial), Henry Davis (killed in the robbery), and Appellant Yates talked about various places to rob and rode around in the car of Davis looking for a store which could be easily robbed. As a part of the plan, they borrowed a gun from the Appellant's brother. On the following day, February 13, they continued to ride around, casing places to rob. The Appellant and Davis left Loftis (who turned state's evidence) at a shopping mall and drove away with the pistol under the passenger's side of the front seat. The Appellant and Davis subsequently entered Wood's rural

store, by the Appellant's own testimony, for the purpose of committing armed robbery. Appellant was armed with the pistol and Davis with a knife. They demanded and received approximately $3,000 from Willie Wood, who was alone and in charge of the store operation. When Willie Wood failed to cooperate to the satisfaction of the robbers, the Appellant shot him, but not fatally. About that time, the mother of Willie Wood, who was the postmistress in the adjoining building, came upon the scene. The Appellant ran out of the store, taking the money and the gun. Davis remained in the store, and stabbed Mrs. Wood to death with his knife. Willie Wood succeeded in obtaining a gun and killed Davis. After Appellant waited in Davis' car and concluded that Davis had been caught, he drove off, hid the money and pistol in a wooded area, and was later apprehended.

The Appellant testified in his own behalf. His testimony was not inconsistent with the facts recited above. It was his contention that he did not kill Mrs. Wood and that it was his intent all along to abandon the robbery without hurting anybody if the victims refused to cooperate.

The Appellant has stated forty exceptions in quest of a reversal of the convictions and sentence. These exceptions have been argued in the form of twenty questions as included in the Appellant's Brief.

The first three questions submit error on the part of the trial judge in (1) qualifying Volpe, Wallace, Springfield, and Trammell, (2) in excusing certain jurors because of their opposition to capital punishment and (3) refusing to excuse prospective jurors because of their response to *voir dire* questions. We have reviewed the relevant portions of the record dealing with these exceptions and the jurors involved. The interrogations of jurors must be considered as a whole. The qualifications should not be determined on the basis of isolated questions and answers not truly meaningful. The judge must exercise his discretion in qualifying and excusing jurors. We find no error. Certainly, there is no abuse of discretion. Appellant's rights, under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) have not been violated. Principles enunciated in that case have been respected and applied.

Next, Appellant asserts that the trial court erred in denying the motions for change of venue, a change of forum and for additional peremptory challenges. The first two of these are discretionary; peremptory challenges are controlled by statute. We find no showing that this discretion has been abused or that Appellant has suffered from actual juror prejudice. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981). The trial court properly denied these motions.

Early on, we point out that throughout the trial, the prosecuting attorney made it clear that he was not prosecuting the Appellant on the theory of a felony murder. It was his contention that both Appellant Yates and deceased Davis were present aiding and abetting each other in the commission of a planned armed robbery and that the hand of one was the hand of all. The judge charged the law of common law murder applicable in this state.

Appellant argues that the trial court erred in denying his motion to strike armed robbery as an aggravating circumstance. The possibility that Appellant was convicted on a theory of vicarious liability and then sentenced to death based upon the aggravating circumstances of armed robbery which was the foundation of the original murder conviction is asserted by Appellant to be reversible error.

The trial judge in the penalty phase of the trial instructed the jury that the only statutory aggravating circumstance which they were to consider was the murder which was committed while the Defendant was in com-

mission of the crime of robbery while armed with a deadly weapon. This is a statutory aggravating circumstance pursuant to South Carolina Code § 16-3-20(C)(a)(1)(e) (Cum.Supp. 1981). Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder. *State v. Thompson, supra.* The Appellant is equally responsible for the stabbing death of Mrs. Wood, even though he did not actually cast the fatal blows. Appellant and Henry Davis entered the store armed and did commit a robbery. As a direct result of their joint actions in committing the armed robbery, Mrs. Wood was killed.

> That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. *Lockett v. Ohio*, 438 U.S. 586, 602, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978).

There was no error in the trial judge's denying Appellant's motion to strike armed robbery as an aggravating circumstance.

Appellant further argues that the trial court erred in denying Appellant's motion to authorize the spending of certain state funds pursuant to South Carolina Code § 16-3-26(C) for a jury selection expert and for an expert as to the non-deterrent effect of capital punishment.

The decision of the amount of statutory funds to be expended rests in the discretion of the trial judge. This court will not disturb such decisions absent a showing of an abuse of that discretion. Appellant requested a five-hundred dollar fee for a jury selection expert. This expert stated that he would provide his expertise regardless of whether or not the court ordered the payment of his

fee. His services were available in spite of the lower court's refusal to authorize such funds.

We are of the opinion that the trial judge did not abuse his discretion in denying these requests. This statute does not require the trial judge to honor every request made by defense counsel. But only those requests that ". . . are reasonably necessary for the representation of the defendant. . . ." The court is empowered to decide which requests are appropriate. No error.

Appellant asserts that the trial court erred in allowing the Solicitor to express his opinion of the deterrent effects of capital punishment in argument to the jury. In reviewing this argument, as a whole, we find the argument to be within the perimeters permitted by this Court. The Solicitor's argument was acceptable and well within the confines as set forth by the lower court. The trial judge stated before these arguments that both sides would be allowed wide latitude in arguing their respective positions concerning the deterrent effect of capital punishment.

Appellant challenges the trial court's refusal to enjoin the Solicitor from seeking the death penalty in his case. Appellant based this challenge on the prosecutor's record of handling previous death penalty cases involving triggermen and non-triggermen. A triggerman is the person who actually fires the fatal shots or uses the deadly weapon to cause a death. Appellant argues that the Solicitor normally sought the death penalty only against the triggerman.

It would be error for the trial judge to tell a Solicitor how to determine whether the death penalty should be sought. This is the prerogative of the Solicitor. The exception is without merit.

Appellant's motion seeking to prevent pre-trial press coverage of the preliminary hearing was properly denied by the magistrate in question. Appellant has failed to

show any actual prejudice by the press coverage or the magistrate's handling of this one limited purpose phase of the trial.

The trial judge's finding of ". . . fact beyond any reasonable doubt that this defendant is competent to stand trial . . ." is well supported by ample evidence before the lower court. Appellant's exception as to his competency to stand trial is without merit.

Appellant asserts that it was error for the trial court to deny his request for separate juries in the guilt and penalty phase of the trial. Also, it was error to excuse potential jurors who were opposed to the death penalty. The death penalty statute in South Carolina does not contemplate or provide for two separate juries in such a trial. This court has resolved the issue of disqualifying jurors who oppose the death penalty adversely to the Appellant in *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) and *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980).

When Appellant was testifying in his own behalf, the State, at cross-examination, was allowed for purpose of impeachment to introduce Appellant's prior criminal record as follows: two indictments involving house-breaking and larceny; four indictments charging the crime of larceny; and four indictments charging arson. It is uncontested that the house-breaking and larceny charges were appropriate. Appellant urges, however, that the court erred in allowing in evidence the four charges involving arson. They involved the burning of three barns and a hut. All of these were relevant on the credibility issue. Offenses involving moral turpitude are permitted but those not involving moral turpitude should be excluded. Whether a particular offense constitutes a crime of moral turpitude has been developed in South Carolina on a case by case basis as a matter of common law. The traditional definition of moral turpitude is:

> . . . an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. . . . *State v. Horton*, 271 S.C. 413, 248 S.E.2d 263 (1978)

We hold that arson involves an act of baseness, vileness and depravity. Grand larceny is beyond question an offense involving moral turpitude. There is involved the usurpation of another's personal property with intent to commit it to the use of the taker. Arson, like vandalism, is, in many senses of the word, more reprehensible. It involves the destruction of the property of another with not only the intent to deprive the true owner of its use but to also deprive any other person of its use and benefits. We hold that the trial judge correctly admitted the conviction of arson for the limited purpose of impeaching the witness.

Appellant requested by way of discovery an out of court statement made by Willie Wood. The trial court obtained a copy of this statement and advised Appellant's counsel: "I'll give it to you if you need it." The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with the indictment and trial testimony. The Appellant was not deprived of information of which he was not already aware and which was actually available to him.

Appellant argues that the lower court erred by failing to direct a verdict for Appellant as to the murder count. We disagree. The evidence must be viewed in light most favorable to the State and any evidence, direct or circumstantial, reasonably tending to prove guilt of the accused, creates a jury issue. *State v. Hall*, 268 S.C. 390, 395, 234 S.E.2d 219, 221, *cert. denied*, 434 U.S. 870, 98 S.Ct. 211, 54 L.Ed.2d 147 (1977).

Appellant and Henry Davis planned and jointly executed an armed robbery. The Appellant was armed at the time of the robbery with a pistol which he used to shoot Mr. Wood, from whom money was taken. Appellant drove away only after he (Appellant) thought Davis had been caught. Meanwhile, Davis had stabbed Mrs. Wood to death.

"One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Woomer*, 276 S.C. 258, 277 S.E.2d 696 (1981). *State v. Hicks*, 257 S.C. 279, 284, 185 S.E.2d 746, 748 (1971). South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), citing *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946). The evidence made a jury issue as to the murder charge.

Appellant asserts as error the trial judge's refusal to charge the state's request number 3, concurred in by the Appellant, which set forth a theory of felony murder. As stated above, the state did not proceed on the felony murder theory. The proposed charge was not a correct statement of the law applicable to the present case. The trial judge must determine the law to be charged from the evidence presented. *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). We are of the opinion that the trial judge correctly and precisely determined the applicable law and charged it.

The Appellant requested the trial judge to charge the jury as a mitigating circumstance: "That Dale Robert Yates did not kill the victim Helen Wood." This request was made incident to the penalty phase charge of the bifurcated trial after Appellant had already been convicted of murder. The judge very properly told counsel, in lieu of granting the request, "you may argue it [to the jury]

all you wish to." Presumably, counsel did exactly that. The fact that Yates did not do the stabbing personally was one of the facts upon which counsel relied in hopes of obtaining a life sentence. Instead of charging the jury in the language suggested by counsel, the judge submitted a charge which was reduced to writing and taken to the jury room, as required by the code, which reads as follows:

> Secondly, the Defendant asks you to consider that the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor. In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow.

The charge, first orally and then in writing, to the jury, let it know that it should give consideration to the fact that Yates did not personally stab Mrs. Wood. The thought counsel wished the judge to convey was actually given to the jury, although not in the exact verbiage requested. We find no error.

The next issue submitted to the Court involves the application of a portion of § 16-3-20(C) (Cum.Supp. 1981), which reads as follows:

> Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment.

After the jury had deliberated for approximately fifty minutes whether the Appellant should receive a life sentence or a death sentence, the foreman reported that the

jury was deadlocked. The judge, in a brief statement, said: ". . . I would not conclude that after the length of time which you have deliberated that you have given due and thorough deliberation to the matter before you, and I am going to ask you to return to the jury room and continue your deliberations." The jury complied and returned approximately two and one-half hours later with a verdict recommending the death penalty. Appellant contends that the trial judge should have told the jury that if it was not capable of breaking the deadlock, the court would impose a life sentence. This same issue was before this Court and was settled in *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981). The words of the Court are equally applicable here. We said:

> The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

The last questions raised by the Appellant call upon this Court to perform the duty imposed upon it by § 16-3-25(C) of our Code. In addition to the traditional alleged errors of law which the Court must rule upon, the statute imposes upon the Court, the duty to

> . . . [C]onsider the punishment. . . .
> . . .
>
> (C) With regard to the sentence, the court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

It is the contention of the Appellant that this Court should vacate his death sentence because it was influenced by passion, prejudice and arbitrary factors and that the sentence of death was excessive or disproportiate to the penalty imposed in similar cases when both the crime and the defendant are considered. We discussed the duty of the Court under the statutory requirements in the case of *State v. Copeland, et al.*, 278 S.C. 572, 300 S.E.2d 63 (1982), to which reference is made. While the duty imposed is a difficult one because no two defendants and no two crimes are exactly alike, it is not an unsurmountable chore. Prior to imposition of sentence, the trial judge, who heard the entire case, made this finding:

> Mr. Yates, as the trial judge in the case just concluded in which you are indicted for the crime of murder, prior to imposing the death sentence upon you, I find as an affirmative fact beyond any reasonable doubt that the evidence warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor.

The totality of the record abundantly supports the trial judge's finding. We agree that the evidence warrants the death penalty and our independent finding and conclusion is that the penalty was not the result of prejudice, passion or any other arbitrary factor.

The Appellant emphasizes more particularly his contention that the sentence is disproportionate to penalties imposed in similar cases. He argues that he personally

did not stab and cause the death of Mrs. Wood. He testified during the trial that at the time of her death he was not in the store but had departed to the getaway car.

While the case of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) had not been decided at the time of the trial, it has been argued orally and we consider it in the light of Appellant's reliance upon it. In *Enmund*, Sampson and Jeannette Armstrong went to the backdoor of the house of Thomas and Eunice Kersey. Sampson Armstrong grabbed Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Sampson Armstrong, and perhaps Jeannette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, took their money and fled. Enmund was at that time in a parked car approximately two hundred yards from the house. He was the getaway man. After the Supreme Court of Florida affirmed Enmund's conviction of murder and his death penalty, the Supreme Court of the United States granted *certiorari* to determine ". . . whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life nor intended to take life." The gravamen of the holding that Enmund's death penalty was impermissibly excessive under the Eighth Amendment of the United States Constitution is to be found in the following language of the Court:

> Here the robbers did commit murder, but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we in-

sist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U.S. 586, 605 [98 S.Ct. 2954, 2965, 57 L.Ed.2d 973] (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U.S. 280, 304 [96 S.Ct. 2978, 2991, 49 L.Ed.2d 944] (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

. . . .

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

. . . .

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judg-

ment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

The difference between the culpability of Enmund and the culpability of the Appellant is readily apparent. The culpability is different because the degree of participation was different. Enmund expected the Armstrongs to rob the Kerseys, bring the money to the car and that all would depart. On the other hand, Appellant Yates possessed the more potent weapon, a gun, and failed to kill Willie Wood merely because his aim was less than perfect. It is of little significance that the life he intended to take and attempted to take was that of Willie Wood instead of his mother, who was actually stabbed. We have no difficulty in differentiating the case at hand from that of *Enmund*.

There can be no serious doubt but that the evidence cited hereinabove together with the remainder of the record, amply supports the jury's findings of a statutory aggravating circumstances as enumerated in § 16-3-20 of our Code. Section 16-3-20(C)(a) defines one of the aggravating circumstances as follows:

> (1) Murder was committed while in the commission of the following crimes or acts:
>
> . . . (e) robbery while armed with a deadly weapon, . . .

This aggravating circumstance was proven by the Appellant's own testimony. There are no offseting mitigating circumstances of consequence.

In determining whether or not the sentence here imposed is excessive or disproportionate in light of the crime and the defendant, this Court has reviewed the entire record. We have also considered the circumstances of *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179, *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 863, the only

prior holding of this Court suitable for comparison. In that case, the two defendants, Gilbert and Gleaton, spent a morning cruising in search of a target to rob. The same preclude to crime also appears in the record of *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458, rehearing denied 457 U.S. 1112, 102 S.Ct. 2917, 73 L.Ed.2d 1323. In the instant case, appellant with Davis and Loftis apparently contemplated robbery for over a day, making a diligent search of Greenville County for just the right setting. Indeed, Loftis, one of the accomplices, withdrew from the enterprise before the actual robbery and testified to this lengthy prologue.

As in *Gilbert*, *supra*, Appellant and his cohort, Davis, found a solitary, apparently unarmed victim in Mr. Willie Wood. In almost every respect, the robbery unfolded as in the case of Gilbert and Gleaton with one assailant wielding a knife and the other a pistol. Mr. Wood was directed to lean over the store counter by Davis who appeared ready to stab him with the knife. At this point, however, the victim refused to obey. At Davis' command, the Appellant fired two bullets at Wood from close range and fled. From this a jury could conclude beyond a reasonable doubt that Appellant fully intended Wood's death, either by Davis' hand or his own, in the course of this armed robbery.

Hereafter the facts diverge from our previous cases. Mr. Wood did not die from his wound but instead seized his own gun and fought off Davis. Willie Wood's sixty-eight year-old mother then came upon the scene and was stabbed to death by Davis, who in turn was shot and killed by Wood. Although this outcome sets the instant case apart from previous capital sentences we have affirmed, it is sufficient for our purposes that the Appellant displayed the same intent and followed the same pattern of preparation as Gilbert, Gleaton and Thompson before him.

In mitigation, Appellant offered his own testimony and that of his mother. The jury learned that Appellant had been a poor student in school, achieving basically a ninth grade education. In Appellant's own words, he was more interested in "getting out and having fun, shooting pool." If given a life sentence, however, he intended to write a book, study, and improve the prison system. Appellant frankly conceded that he had not managed to do these things during ten previous periods of incarceration. Both Appellant and his mother testified generally that he had some history of drug abuse and that, most importantly, he allowed himself to be influenced by Davis, the deceased accomplice. Appellant did not contend, however, that he was actually inebriated at the time of the robbery nor that Henry Davis forced him to participate.

The trial judge meticulously instructed the jury on the available circumstances under § 16-3-20(C)(b)(1), (4), (5) and (7). In addition, the trial court orally and in writing directed the jury to consider any other mitigating circumstances presented by the defendant.

In our view, the Appellant had the benefit of every reasonable explanation for his acts. We are satisfied that the jury properly found the aggravating circumstances of robbery while armed with a deadly weapon and did so without any influence of passion, prejudice or other arbitrary factor. The testimony in mitigation is comparable to that in *State v. Gilbert*, *supra*, if not somewhat less impressive, given the claim of Gilbert and Gleaton that they had partaken of drugs and were acting solely on impulse. We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. Given that we have upheld a comparable sentence in the comparable case of *State v. Gilbert*, *supra*, we are confident that the finding of this jury represents consistent application of the ultimate sanction in this category of capital crime.

As indicated hereinabove, Appellant has filed forty exceptions in quest of a reversal. Many have not been argued and some have admittedly been abandoned. Issues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed prejudicial error; we find none. The convictions and sentence of the Appellant, Dale Robert Yates, are, accordingly,

AFFIRMED.

THE SUPREME COURT OF SOUTH CAROLINA

[Title Omitted in Printing]

ORDER

Dale Robert Yates has petitioned this Court for a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief.

After careful consideration of this petition, we are of the opinion it should be denied.

We have also considered the petition for writ of habeas corpus and conclude it should be denied.

/s/ Bruce Littlejohn, C.J.
For the Court

Columbia, South Carolina

May 22, 1985

SUPREME COURT OF THE UNITED STATES

No. 85-5193

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Supreme Court of South Carolina for further consideration in light of *Francis* v. *Franklin*, 471 U.S. —— (1985).

October 15, 1985

SUPREME COURT OF SOUTH CAROLINA

No. 22614

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

Heard March 26, 1986

Decided Sept. 29, 1986

NESS, Chief Justice:

This case is before us on remand from the United States Supreme Court for reconsideration of Yates' petition for writ of habeas corpus. The petition is denied.

Yates was convicted of murder and armed robbery in 1981 and was sentenced to death upon recommendation of a jury. This Court affirmed the conviction and sentence. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. den., 462 U.S. 1124, 103 S.Ct. 3098, 77 L.Ed.2d 1356 (1983). Yates' application for post conviction relief was denied, and he sought a writ of certiorari from this Court to review the decision of the circuit court. Yates also filed a petition for writ of habeas corpus in the original jurisdiction of this Court alleging, for the first time, constitutional error in the jury instructions at trial. The petitions were consolidated and both were denied by summary order. The United

States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). *Yates v. Aiken*, —— U.S. ——, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

At Yates' trial the jury was instructed that malice is presumed from the use of a deadly weapon. No objection to the charge was made, and the issue was not raised on direct appeal. Approximately one year after Yates' conviction was affirmed, this Court found error in a similar malice charge. *State v. Elmore*, 279 S.Ct. 417, 308 S.E.2d 781 (1983). The jury instruction at Yates' trial suffered from the same infirmities present in *Elmore* and addressed in *Francis v. Franklin, supra.*

The question we must resolve is whether *Elmore* may be applied retroactively to invalidate a conviction which was final at the time *Elmore* was decided. We have expressly stated that *Elmore's* retroactive effect is limited to cases pending on direct appeal at the time that case was decided and will not apply to collateral attacks on criminal convictions. *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985). In light of the remand of this case, however, we take this opportunity to re-evaluate and expand on our holding in *McClary.*

Decisions from the United States Supreme Court regarding retroactive application of new rules of criminal law are a mass of confusion. Indeed, that Court has noted that the development of the law of retroactivity is "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 2584, 73 L.Ed.2d 202 (1982), citing *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 1172, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring). In applying those precedents at the state level to determine the retroactive effect of a prior state decision, one factor is controlling. "Retroac-

tive application is not compelled, constitutionally or otherwise." *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). *See also, United States v. Johnson*, 102 S.Ct. at 2583, citing *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); ["'The Constitution neither prohibits nor requires . . . retrospective effect' be given to any 'new' constitutional rule."]; and citing *Great Northern R. Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ["'the federal constitution has no voice upon the subject' of retrospectivity."] In the absence of constitutional mandate, this Court is free to determine our own standards regarding retroactivity of state decisions.

While not binding on us, several of these decisions are instructive on the issue of retroactivity.

Prospective application should be afforded a new rule of criminal procedure which is a "clear break" from earlier precedent. *United States v. Johnson*, 102 S.Ct. at 2587, citing *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). *See, e.g., Batson v. Kentucky*, —— U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (White, J., and O'Connor, J., concurring in separate opinions; Burger, C.J., and Rehnquist, J., dissenting). *See also State v. Hawkins*, South Carolina Supreme Court Order dated June 6, 1986 [applying *Batson v. Kentucky* prospectively from the date of the decision.] Full retroactivity, even by collateral attack, should be permitted when a ruling establishes that the trial court's action is void *ab initio* or that defendant's conduct was not subject to criminal punishment. *United States v. Johnson*, 102 S.Ct. at 2587, and cases cited therein. The gray area between these two bright line rules has resulted in the majority of litigation on this issue.

We are persuaded by Justice Harlan's view that a new rule of criminal law which does not fall into one of the

categories discussed above should be applied retroactively to all cases pending on direct review at the time the new decision is issued. *See, Desist v. United States, supra* (Harlan, J., dissenting); *Mackey v. United States, supra,* (Harlan, J., concurring) [adopted in *United States v. Johnson, supra,* as to new decisions arising under the Fourth Amendment.] *See also, Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38, citing *United States v. Johnson*, 102 S.Ct. at 2594. This rule is, of course, subject to traditional standards of waiver and harmless error.[1] *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38 (1985) at footrote 4; *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

Justice Harlan's view has several advantages. Retroactive effect of a new rule is appropriate when the purpose of the new rule is to "enhance the accuracy of criminal trials." *Solem v. Stumes*, 104 S.Ct. at 1342. On one hand, the Harian approach avoids the problem of the Court becoming a "super-legislature," picking one case at random in which to announce a new rule, "then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule." *Shea v. Louisiana*, 105 S.Ct. at 1069. On the other hand, it prevents the illogical result of reversing, on collateral review, a decision on the basis of a rule of law which did not exist at the time the case was finally decided. *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977) (Powell, J., concurring).

Accordingly, we adhere to our decision in *McClary* that the retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided. Collateral attack of a criminal conviction on the

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[1] *See also, Rose v. Clark*, —— U.S. ——, 106 S.Ct. 3101, 92 L.Ed. 2d 460 [applying harmless error analysis in a collateral attack (habeas corpus) on an unconstitutional jury instruction without addressing the issue of retroactivity].

basis of legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction.

We realize that many factors affect the progress of a case through the judicial system, and the speed of appellate review will necessarily differ from case to case. Even under our view of the scope of retroactivity, it may be inevitable that some similarly situated defendants will be treated differently. *United States v. Johnson*, 102 S.Ct. at 2591, footnote 17. However, we believe our approach is less likely to result in inequitable treatment among similarly situated individuals than is the approach applied by the federal courts. "The disinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come." *Shea v. Louisiana*, 105 S.Ct. at 1070.

While we affirm Yates' conviction, we raise, *sua sponte*, the propriety of Yates' death sentence in light of the United States Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.E.2d 1140 (1982). In that case, the Supreme Court held the Eighth Amendment forbids the imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 3376. *See, State v. Peterson & Stubbs*, 287 S.C. 244, 335 S.E. 2d 800 (1985). Rather than remanding this case for a new sentencing proceeding, this Court may make its own review of the record to determine the factual questions raised by *Enmund*. *Cabana v. Bullock*, —— U.S. ——, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). See also *State v. Patterson*, 285 S.C. 5, 327 S.Ed.2d 650 (1984).

Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood, and entered the store.

Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood, who was standing behind the store counter. Yates demanded money. Wood hesitated, and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed. He learned of their deaths after his arrest.

Yates was found guilty of the murder of Mrs. Wood under the theory of the "hand of one, hand of all." When two or more persons aid, abet and encourage each other in the commission of a crime, all being present, each is guilty as a principal. *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971).

Enmund does not prevent a conviction of murder against one who did not actually take life. It does not "affect the state's definition of any substantive offense, even a capital offense." *Cabana v. Bullock*, 106 S.Ct. at

696, citing *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984). Rather, its holding relates solely to the imposition of the death penalty upon one already convicted of murder as the state defines that offense.

We have little difficulty in finding that Yates attempted to kill and intended that life be taken. He attempted to kill Wood by shooting him in the chest. Even though the ultimate victim was someone other than the person Yates attempted to kill, Yates' intent is not diminished in any way. *State v. Gandy*, 283 S.Ct. 571, 324 S.E.2d 65 (1984). Therefore, Yates' death sentence is appropriate under the holding of *Enmund v. Florida.*

The petition for writ of habeas corpus is

DENIED.

GREGORY, HARWELL and CHANDLER, JJ., concur.

FINNEY, J., dissents in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, the doctrine of retroactivity should not prevent this court from reviewing constitutional issues or court decisions affecting the truth-finding process when raised in collateral proceedings.

The majority opinion concludes that *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985) and *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985), support the concept of a limitation on the doctrine of retroactivity in the application of the principles enunciated in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), to those cases pending on direct appeal. The majority's attempt to distinguish between direct and collateral challenges in the application of the doctrine of retroactivity is, in my opinion, misplaced in cases where the alleged error affects the truth-finding function and particularly in those cases where the state seeks the ultimate punishment.

The majority justifies its distinction on the need to draw "the curtain of finality," citing *McClary v. State, supra*, and *Shea v. Louisiana, supra.* I would respectfully point out that neither *McClary* nor *Shea* was a death penalty case; and under South Carolina law in death penalty situations, we are required to conduct in favorem vitae review. The majority apparently overlooks or minimizes the finality of its decision in this case—death—where there is a strong possibility that the conviction was constitutionally infirm. The concern for finality that might otherwise dictate non-retroactive review of constitutional decisions on collateral attack should not override constitutional considerations in the instant case.

In *State v. Elmore, supra*, this court held that a presumption of malice from the use of a deadly weapon erroneously constituted a mandatory presumption rather than a permissive inference. In *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), this court found that such mandatory presumption is prejudicial and constitutes reversible error. These two decisions are in line with the decision of the Supreme Court of the United States, holding that erroneous instructions regarding a necessary element of an offense such as malice substantially impairs the truth-finding functions of the jury. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

In *McClary v. State, supra*, the Supreme Court of South Carolina held that retroactive application of *State v. Elmore*, will be limited to those cases pending on direct appeal and will not apply to collateral attacks on criminal convictions. Prior to *McClary*, the Court allowed review of *Elmore*-type errors retroactively in *State v. Woods, supra, State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983), and *State v. Llewellyn*, 281 S.C. 199, 314 S.Ed.2d 326 (1984). A reading of *McClary* shows that this court based its decision upon its understanding

of *Shea v. Louisiana*, *supra*, whose reasoning the court adopted and presumably accepted as binding precedent. I would point out that the Supreme Court of the United States, in *Shea*, was concerned with a non-truth-finding error, whereas the error complained of in this case is clearly a truth-finding error.

The principles of retroactivity set forth in *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed. 2d 202 (1982); and *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), provide a rational framework for applying new constitutional decisions retroactively. These decisions recognize that complete retroactive effect should be given, even when raised by collateral proceedings, to new constitutional rules whose major purpose is to overcome an aspect of the criminal trial that substantially impairs the truth-finding function and raises serious questions about the validity of guilty verdicts. This pronouncement of retroactivity is made particularly clear in *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), wherein the United States Supreme Court held:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

See also *United States v. Johnson*, *supra*, and *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

The doctrine against burden shifting presumptions set out in *Francis v. Franklin*, *supra*, is not a clear break with prior law. The United States Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's

requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury.

I also dissent because the majority, *sua sponte*, addresses the question of the propriety of Yates' death sentence in light of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and without the benefit of briefs, oral arguments or consideration of any differences between Florida and South Carolina law dealing with the responsibility of persons who did not actually inflict the mortal wound, concludes that the death sentence was appropriate, relying upon *Cabana v. Bullock*, —— U.S. ——, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), and *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), both of which are easily distinguishable.

I would reconsider and remand this case to the trial court for a new trial.

SUPREME COURT OF THE UNITED STATES

No. 86-6060

YATES

v.

AIKEN, WARDEN, *et al.*

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Argued December 2, 1987—Decided January 12, 1988

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store, a fight occurred in which the accomplice and the storekeeper's mother were both killed. Petitioner was convicted of murder and armed robbery and sentenced to death. His conviction and sentence were affirmed by the South Carolina Supreme Court in 1982. *State* v. *Yates*, 280 S. C. 29, 310 S. E. 2d 805 (1982), cert. denied, 462 U. S. 1124 (1983).

At his trial, petitioner testified that the decedent had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon."[1] A few months after petitioner's conviction was affirmed, the South Carolina Supreme Court held that it was error to give such an instruction. See *State* v. *Elmore*, 279 S. C. 417, 308 S. E. 2d 781 (1983). Thereafter, petitioner sought a writ

[1] See App. 7; Tr. 1208.

of habeas corpus from the South Carolina Supreme Court, arguing that the burden-shifting instruction given at his trial was unconstitutional under the state court's reasoning in *Elmore* and under our decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). While the application for habeas corpus was pending, we decided another case involving a burden-shifting instruction, *Francis* v. *Franklin*, 471 U. S. 307 (1985), and petitioner promptly called that decision to the attention of the State Supreme Court. The court denied the writ without opinion.

Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of *Francis* v. *Franklin*." *Yates* v. *Aiken*, 474 U.S. 896 (1985). On remand, the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in *Elmore* and addressed in *Francis* v. *Franklin*." 290 S. C. 231, 233, 349 S. E. 2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in *Elmore* should not be applied retroactively to invalidate a conviction that was final when *Elmore* was decided. The opinion did not consider whether the decision in *Francis* v. *Franklin* might apply retroactively and also did not discuss our decision in *Sandstrom* v. *Montana*, on which petitioner had relied.

In dissent, Justice Finney reasoned that *Elmore* and *Francis* v. *Franklin* should be applied retroactively because an instruction that shifts the burden of proof on an element of the offense—particularly in a capital case—substantially impairs the truth-finding function of the jury. Moreover, he reasoned, given our decision in *Sandstrom* v. *Montana* in 1979, the case did not represent a significant change in the law.[2]

[2] "The doctrine against burden shifting presumptions set out in *Francis* v. *Franklin*, [471 U.S. 307 (1985)], is not a clear break

We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our mandate. 480 U.S. 945 (1987). We now reverse.

I

Our order remanding the case for further consideration in the light of *Francis* v. *Franklin* was predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question. Our opinion in *Francis* explained why a challenge of this kind is supported by the Federal Constitution:

> "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship*, [397 U.S. 358, 364 (1970)]. This 'bedrock, "axiomatic and elementary" [constitutional] principle,' *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom* v. *Montana*, *supra*, at 520-524; *Patterson* v. *New York*, 432 U.S. 197, 210, 215 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684, 698-701 (1975); see also *Morissette* v. *United States*, 342 U.S. 246, 274-275 (1952). The

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with prior law. The United States Supreme Court in *Sandstrom* v. *Montana*, 442 U.S. 510 . . . (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury." 290 S. C., at 239, 349 S. E. 2d, at 88-89.

> prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S., at 372. See *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958)." 471 U.S., at 313.

The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm for the reasons "addressed in *Francis*" was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not. Our mandate contemplated that the state court would consider whether, as a matter of federal law, petitioner's conviction could stand in the light of *Francis*. Since the state court did not decide that question, we shall do so.

II

The South Carolina Attorney General submits that we should adopt Justice Harlan's theory that a newly announced constitutional rule should not be applied retroactively to cases pending on collateral review unless the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Mackey* v. *United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part), or enunciates a procedural rule that is "implicit in the concept of ordered liberty," *id.*, at 693. Under this theory, the Attorney General argues, petitioner would not be entitled to the benefit of our ruling in *Franklin*.

We have already endorsed Justice Harlan's retroactivity analysis for cases pending on direct appeal, see *Griffith* v. *Kentucky*, 479 U.S. 314 (1987) [107 S. Ct. 708, 713]; *United States* v. *Johnson*, 457 U.S. 537 (1982), and we have noted, as Justice Harlan did, *Mackey*, *supra*, at 682-687; *Desist* v. *United States*, 394 U.S. 244, 260

(1969) (Harlan, J., dissenting), the important distinction between direct review and collateral review. Compare *Allen* v. *Hardy*, 478 U.S. 255 (1986) (holding that *Batson* v. *Kentucky*, 476 U.S. 79 (1986) does not apply retroactively to cases on collateral review), with *Griffith*, *supra*, at 322-323 (holding that *Batson* does apply retroactively to cases pending on direct review); see, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (right to appointed counsel on direct appeal not applicable in collateral proceedings). To decide this case, however, it is not necessary to determine whether we should go further and adopt Justice Harlan's reasoning as to the retroactivity of cases announcing new constitutional rules to cases pending on collateral review.

Although Justice Harlan believed that most collateral attacks on final judgments should be resolved by reference to the state of the law at the time of the petitioner's conviction, he emphasized the proposition that many "new" holdings are merely applications of principles that were well settled at the time of conviction. As he explained in *Desist:*

> "The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." 394 U.S., at 263-264.

This reasoning, which we previously have endorsed,[3] is controlling in this case because our decision in *Francis* was merely an application of the principle that governed our decision in *Sandstrom* v. *Montana*, which had been decided before petitioner's trial took place. We explicitly so held in *Francis* itself:

> "The question before the Court in this case is almost identical to that before the Court in *Sandstrom*: 'whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of . . . state of mind,' 442 U. S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense." 471 U. S., at 313.
>
> "*Sandstrom* v. *Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. 442 U. S., at 521. Today we reaffirm the rule of *Sand-*

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[3] We stated in *United States* v. *Johnson*, 457 U.S. 537, 549 (1982):

> "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

See also, *Truesdale* v. *Aiken*, 480 U.S. 527 (1987) *(per curiam)*; *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Lee* v. *Missouri*, 439 U.S. 461, 462 (1979) *(per curiam)*.

strom and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed." *Id.*, at 326-327.

III

The Attorney General also argues that South Carolina has the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding. We reject this argument for two reasons. First, as we have just explained, *Francis* did not announce a new rule. Second, we do not read the South Carolina Supreme Court's opinion as having placed any limit on the issues that it will entertain in collateral proceedings. Since it has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

DALE ROBEPT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL, SOUTH CAROLINA,
Respondents.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Opinion No. 22962

Submitted June 6, 1988—Filed February 6, 1989

PETITION DENIED

GREGORY, C.J.: This case is before us on a petition for writ of habeas corpus. We deny the petition.

In 1981 petitioner was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. He was sentenced to death. The convictions and sentence were affirmed on appeal to this Court. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983).

Petitioner's subsequent application for post-conviction relief was denied by the circuit court in 1984. He then

petitioned this Court for review of that denial by way of writ of certiorari. He simultaneously petitioned for habeas corpus relief on the ground the trial judge's charge on implied malice was improper under state law [1] and under *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*. *Yates v. Aiken*, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

On remand this Court clarified the denial of the petition under state law.[2] *Yates v. Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986). Dissatisfied with this Court's disposition under *Francis v. Franklin*, however, the United States Supreme Court reversed the denial of the petition for habeas corpus. *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It held *Francis v. Franklin*, which condemns a mandatory presumption regarding proof of an element of the crime, applies retroactively to cases pending on collateral review because it merely reiterates the principles announced in the 1979 decision of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] This case was again remanded for further proceedings consistent with the Supreme Court's opinion. 98 L.Ed.2d at 554.

[1] Petitioner argued that under *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in *State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2] We held retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided and does not apply to collateral attacks. *See McClary v. State*, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3] We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under *Sandstrom* on direct appeal in state court. *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); *cf. Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980) (wherein petitioner in *Francis v. Franklin* raised mandatory presumption issue under *Sandstrom* in state court). Of course, we are constrained to accept the high court's mandate that *Francis v. Franklin* applies here.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

In *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court held jury instructions that violate *Francis v. Franklin* are subject to a harmless error analysis. The reviewing court must determine whether on the whole record the erroneous mandatory presumption is harmless beyond a reasonable doubt. 92 L.Ed.2d at 474. The pertinent inquiry is whether the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption. *Id.* Such an inquiry requires us to review the trial judge's charge and the facts of this case in the context of the malice element of the offenses charged.

We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered

Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972); *State v. Gilbert*, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on the theory of accomplice liability.[4]

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict

[4] To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

that petitioner is guilty of murder under a theory of accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. *Rose v. Clark*, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the jury: "malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon . . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S. C. Code Ann. § 16-3-10 (1985). In the context of accomplice liability for murder, the element of malice which must be proved by the State is that of the *killer*. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or

implied. *State v. Hinson*, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

Pursuant to *Rose v. Clark* and based on our exhaustive review of the record, we hold any error under *Francis v. Franklin* is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder.

The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In 1983, this court held that it was error for a trial judge to instruct a jury in a case that malice is mandatorily presumed from the use of a deadly weapon. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Prior to our decision in *Elmore*, we had affirmed Yates' conviction on direct appeal. [*State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982)] and summarily denied his petition for a writ of certiorari.

In 1985, the United States Supreme Court reversed a murder conviction and death penalty sentence in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), holding that where the accused's only defense is that he did not have the required intent to kill, an instruction that intent is presumed from the use of a deadly weapon is error and cannot be considered harmless.

Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in *Francis v.*

Franklin. See, *Yates v. Aiken*, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in *State v. Elmore, supra*, and *Francis v. Franklin*. We, however, declined to apply the *State v. Elmore* standard retroactively. *Yates v. Aiken*, 290 S.C. 231, 349 S.Ed.2d 84 (1986). The retroactive application of *Francis v. Franklin* and the application of *Sandstrom v. Montana* was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in *Francis*' was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of *Francis*, the Supreme Court analyzed the issue of the retroactivity of *Francis v. Franklin* to foreclose any further analysis by this court. The Court held that *Francis v. Franklin* was merely a reaffirmation of its holding in the 1979 *Sandstrom* opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under *Francis v. Franklin*. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of *Francis*, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding *Yates* "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in *Francis v. Franklin* was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the *Franklin* issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of *Francis v. Franklin*. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming *arguendo* that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under *Rose v. Clark*, then, in my opinion, we are still obliged to afford Mr. Yates a

new trial because the erroneous charge which created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Court has mandated.

FINNEY, A.J., concurs.

THE SUPREME COURT OF SOUTH CAROLINA

January 29, 1990

David I. Bruck, Esquire
1122 Lady Street, Suite 301
Columbia, SC 29201

Re: Yates v. Aiken

Dear Mr. Bruck:

The Court refused your Petition for Rehearing in the above case in the following order:

"Petition Denied. Page 4 Substituted.

/s/ George T. Gregory, Jr., C.J.

/s/ David W. Harwell, A.J.

/s/ A. Lee Chandler, A.J.

I would grant.

/s/ Jean H. Toal, A.J.

/s/ Ernest A. Finney, Jr., A.J.

January 29, 1990".

By copy of this letter all counsel are notified of the Court's action and are being forwarded a copy of the amended opinion.

Very truly yours,

/s/ [Illegible]
Clerk

CND,Jr./sag

Enclosure

cc: Stephen J. Henry, Esquire
Honorable Harold M. Coombs, Jr
John I. Mauldin, Esquire
Honorable Donald J. Zelenka

AMENDED OPINION

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL, SOUTH CAROLINA,
Respondents.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Opinion No. 22962

Submitted June 6 1988—Filed February 6, 1989

PETITION DENIED

GREGORY, C.J.: This case is before us on a petition for writ of habeas corpus. We deny the petition.

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Petitioner's subsequent application for post-conviction relief was denied by the circuit court in 1984. He then petitioned this Court for review of that denial by way

of writ of certiorari. He simultaneously petitioned for habeas corpus relief on the ground the trial judge's charge on implied malice was improper under state law [1] and under *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*. *Yates v. Aiken*, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

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[1] Petitioner argued that under *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2] We held retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided and does not apply to collateral attacks. *See McClary v. State*, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3] We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under *Sandstrom* on direct appeal in state court. *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); *cf. Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980) (wherein petitioner in *Francis v. Franklin* raised mandatory presumption issue under *Sandstrom* in state court). Of course, we are constrained to accept the high court's mandate that *Francis v. Franklin* applies here.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

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We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused,

Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972); *State v. Gilbert*, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on the theory of accomplice liability. To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of

accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. *Rose v. Clark*, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon . . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (1985). On the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or implied. *State v. Hinson*, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury

would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

Pursuant to *Rose v. Clark* and based on our exhaustive review of the record, we hold any error under *Francis v. Franklin* is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder. The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary

defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

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Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in *Francis v. Franklin*. See *Yates v. Aiken*, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in *State v. Elmore, supra*, and *Francis v. Franklin*. We, however, declined to apply the *State v. Elmore* standard retroactively. *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). The retroactive application of *Francis v. Franklin* and the application of *Sandstrom v. Montana* was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.E.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in *Francis*' was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of *Francis*, the Supreme Court analyzed the issue of the retroactivity of *Francis v. Franklin* to foreclose any further analysis by this court. The Court held that *Francis v. Franklin* was merely a reaffirmation of its holding in the 1979 *Sandstrom* opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a

new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under *Francis v. Franklin*. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of *Francis*, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding *Yates* "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in *Francis v. Franklin* was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the *Franklin* issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of *Francis v. Franklin*. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming *arguendo* that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under *Rose v. Clark*, then, in my opinion, we are still obliged to afford Mr. Yates a new trial because the erroneous charge which

created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the

State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Supreme Court has mandated.

FINNEY, A.J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 89-7691

DALE ROBERT YATES,
Petitioner

v.

PARKER EVATT, Commissioner, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 1, 1990